Supreme Court, U.S.
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No.

In the Supreme Court of the United States

RANGER CELLULAR
AND
MILLER COMMUNICATIONS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA

PETITION FOR *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) The text of a federal statute amending the Communications Act established a protected class of commercial radio applicants which (a) was not limited to broadcast radio applicants, and (b) expressly included both broadcast and non-broadcast entities. Could the FCC limit the application of that statute only to broadcast applicants on the basis that the legislative history of the statute mentioned only broadcast entities?

(2) When a reviewing court determines that an agency erroneously found a statute "clear on its face" under *Chevron* Step I, must the court remand the case to the agency to interpret the ambiguity or construe the statute itself?

(3) When an agency deviates from twenty years of consistent prior practice, may a court accept an argument offered on appeal but not articulated by the agency itself as justification for the deviation?

PARTIES AND RULE 29.6 DISCLOSURES

The parties before the United States Court of Appeals for the District of Columbia Circuit were Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller"), the Federal Communications Commission ("FCC") and United States of America.

Ranger is a general partnership without any subsidiaries, parent companies or affiliates which have issued shares or debt securities. Miller is a closely held Alabama corporation without any subsidiaries, parent companies or affiliates which have issued shares or debt securities.

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PETITION FOR *WRIT OF CERTIORARI*

Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller") (collectively, "Petitioners"), by their attorneys, respectfully petition for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. p. 1) is reported at *Ranger Cellular v. FCC*, No. 02-1093 (D.C. Cir. July 1, 2003). Its Order denying reconsideration *en banc* is reported at *Ranger Cellular v. FCC*, No. 02-1093, (D.C. Cir. Sept. 10, 2003) (App. p. 76). The Federal Communications Commission's decision establishing the auction eligibility rules is reported at 17 F.C.C.R. 1960 (2002). (App. p. 13.)

JURISDICTION

The judgment of the Court of Appeals was originally entered on July 1, 2003. Its Order denying rehearing *en banc* was entered on September 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AT ISSUE

The full text of 47 U.S.C. 309 (l) is set out in App. p. 77.

STATEMENT OF CASE

In 1997, Congress established a comprehensive scheme for issuing the vast majority of contested radio licenses by competitive bidding rather than by the lottery or other methods which the FCC had used in the past.[1] At

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[1] *1997 Balanced Budget Act*, Pub. L. No. 105-33, §302(a), 111 Stat. 251 (1997) (amending 47 U.S.C. 309(j) ("BBA").

that time, there were literally thousands of pending cellular radio, broadcast radio, and other categories of mutually exclusive commercial radio applications which had previously been subject to either lotteries or comparative hearings. The FCC had been temporizing for several years on issuing licenses either to cellular applicants or broadcast applicants while Congress decided whether or not to permit (or mandate) the use of competitive bidding for radio licensing. When Congress finally resolved the matter in the BBA, it recognized that there were applications pending and, rather than leave the matter to the FCC's discretion, it enacted language, now codified as 47 U.S.C. 309(l), instructing the Commission as to how it was to deal with those applications:

> *A. Applicability of Competitive Bidding to Pending Comparative Licensing Cases.*
>
> *With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall:*
>
> *(1) Have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit; [and]*
>
> *(2) Treat the persons filing such applications as the only persons eligible to be*

qualified bidders for purposes of such proceeding . . . .

47 USC 309(l). (App. p. 77.) This language protects the pool of original filers from having to compete in an auction with an indefinite number of new filers. The present dispute concerns the FCC's refusal to implement this language insofar as it protects pending applicants for "initial licenses," *i.e.*, non-broadcast radio applicants. The FCC interpreted the statutory language to apply only to applicants for initial "construction permits," *i.e.*, broadcast applicants. The result is that one of the two distinct classes of applicants protected by the statute has been stripped of the protection which Congress expressly mandated.

The history of this proceeding begins more than fifteen years ago. Under the FCC's rules, a deadline was established by which all persons who wished to vie for certain cellular radio licenses had to file applications. Several thousand applications, including those of Petitioners, were timely filed in 1988 and 1989 for the four cellular radio station licenses which are at issue here. The FCC conducted lotteries for the four markets, but for various reasons the original lottery winners were disqualified or dropped out, leaving the licenses vacant. The remaining pool of original lottery applicants was retained in pending status as required by the FCC's rules. In 1999, however, the FCC summarily dismissed all of these pending applications on the grounds that it was required to do so by the BBA. Petitioners timely petitioned the FCC to reconsider their dismissal, arguing that the dismissal of the pending original applications was not only not required by the BBA but, indeed, the pool of

applicants for the auction should include *only* the original filers. The FCC ultimately denied that petition, and the D.C. Circuit recently denied the Petitioners' standing to appeal that dismissal.[2]

In 2001, the FCC initiated a rulemaking proceeding to determine how the cellular licenses for the four markets should be auctioned, including whether any eligibility restrictions should apply.[3] Petitioners submitted comments noting the applicability of Section 309(l) of the Act. Since commercial mobile radio service applicants (including cellular radio applicants) were a subset of the commercial radio applicants identified by the statute as the protected class, the Commission was obligated to limit the pool of eligible participants in the auction to the original applicants. Petitioners also demonstrated that in every other similar case in the past where (1) the licensing procedure had changed in mid-stream and (2) the licenses at issue remained constant, the FCC had always retained the pre-existing applicant pool rather than letting in late filers. By an Order issued in January, 2002,[4] however, the Commission decided to open participation in the auction to the world at large.

Its treatment of the 309(l) issue was cursory to the point of brusqueness. It found that the statutory language

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[2] *Ranger Cellular, et al. v. FCC*, Case No. 02-1155 (D.C. Cir., November 14, 2003).

[3] *In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 16 F.C.C.R. 4296 (2001).

[4] *In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 17 F.C.C.R. 1960 (2002)

was "plain on its face" and that it "clearly" applied only to broadcast facilities, despite the absence of any reference to broadcast facilities anywhere in the statutory text or context.[5] In addition, the FCC pointed to a sentence in the legislative history which indicated that the FCC was required by new Section 309(l) to use auctions to resolve mutually exclusive radio or television broadcast licenses, and this "confirm[ed]" that the section was intended to apply to only those applicants.[6] The FCC then proceeded to accept new applications and conducted auctions for three of the markets in issue.

In the meantime, Petitioners duly petitioned the District of Columbia Court of Appeals for review of the FCC's January 2002 Order, again urging that Section 309(l) applied to all commercial radio applicants, not just commercial broadcasters. That court applied the familiar *Chevron*[7] framework of statutory construction involving administrative agencies: if the meaning of the statute is plain on its face, a reviewing court and the agency must give effect to that meaning; if the statute is silent or ambiguous, the reviewing court must defer to a reasonable interpretation of the statute by the agency. *Chevron* at 843.

Applying this principle, the court of appeals initially acknowledged that the statute on its face does appear to apply beyond the small class of commercial broadcast radio stations. However, it then offered several

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[5] *Id.* at 17, App. at 36-38.

[6] *Id.*

[7] *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984).

considerations that could be deemed to create ambiguity as to whether the section only applied to broadcast stations. First, although the Court noted that Congress otherwise always says "broadcast station" when it means "broadcast station," there is a single section in Title I of the Communications Act where Congress, in setting fees to be paid by various mass media radio stations, referred to commercial AM and FM broadcast radio stations as "radio stations." Second, 309(l) refers to "television stations" which the Court thought (erroneously) were "unquestionably engaged in broadcasting."[8] Third, the heading for Section 309(l) refers to "pending comparative licensing cases." The court felt that this might be an allusion to the comparative *hearing* cases by which broadcast permits were awarded prior to 1994. Finally, the Court looked at the legislative history of 309(l) embodied in a Conference Report which said that the section applied to radio and television *broadcast* stations.[9] These circumstances created sufficient ambiguity in the court's mind to cast doubt on the otherwise plain meaning of the statute. The court therefore deferred to the FCC's interpretation of the statute. (D.C. Circuit Opinion at p. 8-9; App. p. 8-9.)

Significantly, in finding that the statute was ambiguous, the Court of Appeals necessarily overruled

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[8] There are actually several kinds of television stations, including Multipoint Distribution Service television stations, instructional television fixed service television stations, and satellite television stations, which do not broadcast but transmit on a private or subscription basis.

[9] H.R. Conf. Rep. No. 217, 105th Cong. 1st Session at 573 (1997); U.S.C.C.A.N. 194 (1997).

the FCC's own conclusion that the statute was "plain on its face." Because the FCC had deemed the statute clear, it had offered no expert interpretation to resolve the points of supposed ambiguity which the Court had postulated. Second, Petitioners had directed the court's attention to the language in 309(l) which makes it applicable to "applicants for initial licenses and construction permits." Since broadcast applicants apply only for initial construction permits – not licenses – the inclusion of "applicants for initial licenses" in the statutory scheme necessarily meant that the section applied to *non-broadcast* applicants like cellular entities who do apply for "initial licenses". The court acknowledged Petitioners' argument in this regard as being "not without force," but then did not in any way explain how the reference to initial licenses in the statute could be ignored or constructively nullified, nor had the FCC done so.

The Court then went on to consider Petitioners' argument that the FCC had deviated without explanation from a policy which had been followed *without exception* by the FCC for some 20 years. To distinguish this case from that unbroken line, the court accepted a basis offered by FCC counsel on appeal which had not been articulated by the agency itself, namely, that in the most recent similar case there was a need for expeditious grant of the application whereas here there was no such need. *Id.* at p. 10, App. at p. 10.

Petitioners petitioned the Court of Appeals en banc to consider the issue, based on both an internal conflict in the circuit and the fact that the Court had not explained how the explicit inclusion of non-broadcast applicants in the statute could be reconciled with the FCC's "broadcast-

only" conclusion. The petition was denied and this petition followed.

FACTORS WARRANTING *CERTIORARI*

Congress chose in 1997 to radically change the way that the FCC awards radio licenses to mutually exclusive applicants. In doing so, it explicitly dealt with the plight of the thousands of applicants who had been waiting as much as a decade for the FCC to resolve their applications. These applicants included a relatively small number (less than 225) of broadcast applicants who had been in limbo since the 1993 *Bechtel*[10] decision. They also included thousands of applicants for non-broadcast commercial radio licenses such as cellular radio, 39 GHz microwave radio, and other fixed and mobile common carrier radio services. The terms of the statute apply broadly to all pre-July 1997 commercial radio or television applicants without exception. There is nothing whatsoever in the statute that suggests or even implies that the protection afforded by the statute was intended to be limited only to broadcasters. Indeed, the statute includes protective language that could *only* apply to non-broadcasters. Yet the FCC effectively used one suspect sentence of legislative history to countermand the otherwise all-encompassing breadth of the statute. This case therefore starkly presents a situation where legislative history has been so exalted in importance as to

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[10] In *Bechtel v. FCC*, 10 F. 3d 875 (D.C. Cir. 1993), the D.C. Circuit rejected the FCC's long-standing practice of resolving mutually exclusive applications by hearings in which applicants were compared on a set of public interest criteria.

override the intent of Congress as expressed in the statute itself. This is a gross misuse of legislative history as a tool of statutory construction and, particularly where its application severely prejudiced thousands of applicants in the protected class, establishment by this Court of the proper weight to be accorded legislative history is essential.

Second, the FCC declared the statute "plain on its face." This raises the novel question of whether *Chevron* Step II – the step applicable where a statute is silent or ambiguous – applies to this situation. The Court of Appeals found the statute ambiguous and on that basis deferred to the FCC's interpretation of the statute. But the FCC itself had found that the statute was *not* ambiguous and therefore had not gone through the process of expert statutory interpretation which *Chevron* Step II contemplates. Under these circumstances, a reviewing court must either construe the statute itself (as *Chevron* suggests) or remand the case to the agency to interpret the ambiguity (the rule normally followed by the D.C. Circuit but not followed here). This Court has left unclear what course the courts of appeal should follow, and the issue is obviously one of far-reaching importance to all courts charged with reviewing statutory interpretations rendered by administrative agencies.

ARGUMENT

I. Section 309(l) On Its Face Applies To Nonbroadcast As Well As Broadcast Applicants

When Congress authorized the auctioning of radio licenses in the BBA, it recognized that there were mutually exclusive applications in the FCC pipeline

which would potentially be affected by the change in licensing procedures. Congress, apparently concerned that the FCC would take some step to disadvantage those long-pending applications, took affirmative action to protect them. It required the FCC *not* to open the auction for those licenses to new parties but rather to limit eligibility only to those applicants who had applications pending prior to July 1, 1997. There is no reason on the face of it for nonbroadcast applicants to be treated any differently in this regard from broadcast applicants, and Congress suggested no basis for distinguishing the equities applicable to the two types of applicants. The FCC interpreted the statutory protection accorded by Congress to pre-1997 filers as applicable only to broadcast applicants even though nothing in the statute itself reflects such a limitation. In so doing, the FCC, a mere administrative agency, contravened the express directive of Congress as to which applications were to be protected.

A. The Terms of the Statute

Any *Chevron* Step I analysis necessarily begins with the language of the statute itself, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), and it is that language which most strongly supports the application of the law to all pre-1997 commercial filers. The eligibility limitation applies to "competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997." Two things about this language are important. First, it refers to applications for "initial licenses or construction permits." (Emph. added.) These represent two distinct categories of applicants. Congress was certainly aware that in the broadcast services the

initial authorization granted to successful applicants is statutorily required to be a "construction permit"[11] – not a license. This initial authorization allows the successful applicant to build the subject radio or television station. Only after the station is built can the permittee be granted a "license" which may then be renewed for a period of years. By contrast, in the common carrier radio and commercial mobile radio services, applicants are initially granted a "license" rather than a construction permit. See, for example, *Amendment of Part 21 of the Commission's Rules for Domestic Public Fixed Radio Service*, 8 F.C.C.R. 1112 (1993); *Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, 2 F.C.C.R. 1798, 1799 (1987). There is thus a very clear distinction in the statutory scheme between nonbroadcast services, which get "initial licenses," and broadcast services, which get initial "construction permits." Section 309(l) explicitly protects both categories of applicants.

By interpreting 309(l) to apply only to broadcast applicants, the FCC rendered the reference to "applicants for initial licenses" wholly superfluous. Such a result is directly contrary to one of the most venerable rules of

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[11] "A permit for construction shall not be required for Government stations, amateur stations, or mobile stations . . . [or] for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience and necessity would be served by requiring the such permits for any such stations. With respect to any broadcasting station, the Commission shall not have the authority to waive the requirement of a permit for construction . . . ." 47 U.S.C. § 319(d). (Emph. added.)

statutory construction: a statute must, if possible, be construed in such a fashion that every word has some operative effect. *United States v. Nordic Village*, 530 U.S. 30, 36 (1992). *See also*: *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (19920; *Hoffman v. Connecticut Dept. of Income Maintenance*, 429 U.S. 96, 103 (1989). If Congress had intended to cover only broadcast applicants in this section, there would have been no need – and, indeed, it would have made no sense – to make the section apply to competing applications for the type of initial authorization issued only to nonbroadcast applicants. By expressly referencing the initial authorizations applicable to nonbroadcast applicants on the one hand and broadcast applicants on the other, Congress plainly, unequivocally, embraced both.

Equally importantly, the statute, by its terms, applies to all applicants for "commercial radio or television stations." The Commission says that it is "clear" that Congress here meant to refer to commercial radio and television broadcast stations,[12] but we look in vain for any mention of the word "broadcast" in the language of the statute or anywhere in the surrounding context. It is important in this regard to understand that a "radio station" as used in the Communications Act is not what might be casually known on the street as a radio station. In popular vernacular, a radio station might be understood to refer to the type of FM or AM broadcast station that we listen to on our Walkmen. In the world of the Communications Act, however, a "radio station" is defined as any "station equipped to engage in radio

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[12] App. p. 36.

communication or radio transmission of energy." 47 U.S.C. § 153 (35). This encompasses the entire panoply of wireless communications including broadcast stations (defined as a particular type of radio station[13]), cellular radio stations,[14] point-to-point microwave radio stations, multipoint distribution service stations, PCS stations, amateur stations and countless other types and classes of stations that transmit over radio waves.

Everywhere else in Title III of the Communications Act where Congress intended to limit the application of a particular provision to broadcast stations, it uses the term "broadcast" or "broadcasting" station. *See*, for example, 47 U.S.C. § 311(c)(1): "If there are pending before the Commission two or more applications for a permit for construction of a broadcast station, only one of which can be granted, it shall be unlawful . . . ."; 47 U.S.C. § 315: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a

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[13] A "broadcast station," "broadcasting station" or "radio broadcasting station" is a "radio station equipped to engage in broadcasting as herein defined." 47 U.S.C. § 153(5).

[14] Cellular radio is defined as a "commercial mobile radio service." 47 C.F.R. § 20.9. The branch of the FCC which regulates cellular radio was known as the "Commercial Radio Division" in the mid-90's and the mobile radio services regulated under Part 22 are regularly referred to as "commercial radio." See, *e.g.*, *360 Degrees Communications Company*, 14 F.C.C.R. 2005 (1998) (commercial radio services described as including paging, cellular and PCS operations); *Revision of Parts 22 and 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, 15 CR 1083, 1150 (1999).

broadcasting station, he shall afford equal opportunities . . . .''; 47 U.S.C. § 307(c): "Each license granted for the operation of a radio broadcast station shall be for a term not to exceed seven years."[15] All of these provisions apply special requirements to broadcast stations that do not apply to other classes of radio stations. Congress, with almost perfect consistency, uses the limiting word "broadcasting" when it intends to limit the application of a licensing provision only to broadcast radio stations.[16] The absence of any reference to "broadcasting" in 47 U.S.C. § 309(l) is therefore compelling. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); see also, *Barnhart, Commissioner of Social Security v. Sigmon Coal Company, Inc.*, 534 U.S. 438, 453 (2002); *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419 (1998).

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[15] Other examples abound: 47 U.S.C. § 310(b): "No broadcast or common carrier or aeronautical en route or aeronautical fixed station shall be granted to or held by . . . any alien . . . ." 47 U.S.C. § 310(e): "In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules . . . the exclusion shall not terminate solely by reason of changes made in the technical facilities . . . ."

[16] The sole exception in Title III (which covers the field of radio licensing) is 47 U.S.C. § 317 where the entire section deals with the broadcast of certain matter by radio stations and thus is necessarily limited by the context to broadcast stations.

Looked at another way, if Congress had actually intended to limit the application of Section 309(l) only to broadcast applicants, it would have been a simple and customary matter to add the word "broadcasting" after "commercial radio or television." It did not do so. Moreover, there is nothing anywhere in the legislative history to suggest that there was some unique or different problem with broadcast applicants that Congress was trying to rectify to the exclusion of all other similarly situated applicants. In any case, where narrow language would have sufficed to solve a particular problem, Congress' choice of broad language demonstrates the statute's intended breadth of application. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 373 (1986); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). Simply stated, nothing in the text of the statute supports a broadcast-only limitation.

B. The Legislative History is Inconclusive

Chevron tells us that legislative history can also be used in determining Congressional intent,[17] so we must advert to the legislative history here. At the outset of any foray into the thickets of legislative history, it is crucial to remember the principle that legislative history can never supercede the plain text of a statute. *Burlington Northern R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987). Legislative history cannot impose a limitation on the terms of a statute which is not found in the statute itself.

Here the legislative history for 47 U.S.C. § 309(l) is completely contained in a single page of the Conference Report. The pertinent sentence indicates that the new

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[17] *Chevron* at 842-3.

provision "requires the Commission to use competitive bidding to resolve any mutually exclusive applications for radio or television broadcast licenses that were filed by the Commission prior to July 1, 1997." U.S.C.C.A.N. 194 (1997). This sentence is the sum total of Congress's explanation of the provision. The sentence is, of course, true as far as it goes: no one disputes that Section 309(l) applies to broadcast applicants, a point which Congress may have wanted to emphasize since all previous competitive bidding regimes authorized by Congress had excluded broadcast applicants. What the legislative history does not say is that Section 309(l) applies only to broadcast applicants. Yet the FCC and the Court of Appeals treated the Conference Report language as though it expressly limited Section 309(l)'s application only to broadcasters, and then imported that fictional limitation into the statute itself. Two wrongs have therefore operated to deprive Petitioners of a legal right.

Reliance on this particular wisp of legislative history is especially suspect since the FCC had eschewed reliance on *this very sentence* of the legislative history in 1998. At that time the Commission was trying to decide whether 47 U.S.C. § 309(l) *required* it to auction pre-1997 applications or merely authorized it to do so.[18] *In the Matter of Implementation of Section 309(j) of the Communications Act*, 13 F.C.C.R. 15920, 15931 (1998). As noted above, the Conference Report characterizes 47 U.S.C. § 309(l) as "requiring" the Commission to use

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[18] The BBA said that the Commission "shall . . . have the authority to conduct a competitive bidding proceeding" to award these licenses, so the issue arose as to whether this language was mandatory or permissive.

competitive bidding although the text of the statute merely "authorizes" the Commission to use competitive bidding. Using the very analysis applicable here, the Commission refused to rely on the Conference Report language because it was contrary to the actual words of the statute. *Ibid.* at 15932. ("Nor can the statement in the legislative history that auctions are required for these cases override the plain language of the statute, which does not impose such a requirement but merely affords the Commission authority to use auctions.") Having already found this language in the Conference Report to be unreliable as inconsistent with the statute, the FCC nevertheless has imbued it here with decisive weight in adding a limitation to the statute which is not in the statute itself.

Shorn of the broadcast-oriented blinders which the FCC donned in analyzing the issue, the statute presents a straightforward and uncomplicated mandate that applies to all commercial radio applicants. The Court of Appeals fell into the very error warned against in *Ratzlaf v. United States*, 510 U.S. 135, 147-8 (1994): a court should "not resort to legislative history to cloud a statutory text that is clear." By relying on legislative history rather than the statute itself, the Court of Appeals has defeated the express intent of Congress as enacted into law, and prejudiced the rights of long-pending applications which Congress had deemed worthy of protection.

II. A Reviewing Court Owes No Deference Where the Agency Found No Ambiguity

This case presents an interesting conundrum in the application of the *Chevron* analytic framework when the agency and a reviewing court differ as to whether the statute is plain on its face. *Chevron* provides that where Congress has spoken to the precise questions at issue, a

reviewing court must give effect to the unambiguously expressed intent of Congress. *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Only where the statute is silent or ambiguous on the question in dispute must a court defer to an agency's permissible construction. *Chevron* at 843.

Here the FCC expressly found that the statute was "plain on its face". App. at 36. There was no silence and no ambiguity. Once the FCC made this finding, the Court had no obligation to defer to the agency's "interpretation" as to a silent or ambiguous statute. There is no need for the agency to fill in the blanks because there are no blanks to fill. The more the FCC insisted there was no ambiguity, the less the Court owed any deference to its interpretation of the statute. Here the Court of Appeals attempted the awkward and logically untenable straddle of both overruling the agency's finding of non-ambiguity and "deferring" to the agency's interpretation of the ambiguity. Since neither the FCC nor the Petitioners had argued that the statute was ambiguous, the Court reached this conclusion *sua sponte*.

The problem posed here is that this Court's prior decisions leave unclear whether under these circumstances the correct course for the reviewing court is to simply construe the statute itself or remand the case to the agency to construe it. *Chevron* itself indicates that if the statute is silent or ambiguous, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron* at 842-3, emph. added. This implies that the reviewing court should impose its own construction on the statute where the agency has not offered an interpretation. On the other hand, in *Smiley v.*

Citibank, 517 U.S. 735, 742, 116 S. Ct. 1730, 1734 (1996), this Court indicated that "the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency." This suggests that the reviewing court should remand the case to the agency.

The D.C. Circuit has opted to follow the latter path. *Cajun Electric Power Coop, Inc. v. F.E.R.C.*, 924 F. 2d 1132, 1136 (D.C. Cir. 1991). "We have always seen the first step [of *Chevron* analysis] as conducted under *de novo* review. An agency is given no deference at all on the question of whether a statute is ambiguous, and if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see." However, as we have seen, Court of Appeals here violated its own clearly enunciated policy by not remanding this case to the FCC. It also contravened its own precedent that deference to an agency's statutory interpretation is only appropriate when the agency has actually exercised its own judgment – not when the agency believes its interpretation was compelled by Congress. *Arizona v. Thompson*, 281 F. 3d 248, (D.C. Cir. 2002).

Whether the procedure espoused – but not followed – by the D.C. Circuit in these circumstances is the correct one has never been determined by this Court. This leaves us adrift in a curious lacuna of the *Chevron* analytic framework. Where an agency has determined that a statute is not ambiguous, and the reviewing court determines otherwise, must the reviewing court (a) construe the statute itself since the agency has not done so, or (b) remand the case to the agency to resolve the

ambiguity which the agency had overlooked? The Court of Appeals here did neither. Reviewing courts are confronted thousands of times a year with the *Chevron*-based analytic task of first applying Step I and then, if appropriate, applying Step II. This Court should clarify for the benefit of this and all of those courts how the rule of deference applies when the initial Step I evaluation by the agency is erroneous.

III. The Court of Appeals Accepted *Post Hoc* Rationalizations of Counsel to Justify a Major Deviation from Established Agency Policy

Over the last twenty years, the FCC has not infrequently changed, or been required by Congress to change, its methods of awarding licenses. When such a change occurs, the FCC must, in the absence of a Congressional mandate like that found in Section 309(l), determine how to deal with pending applications which were filed under the earlier licensing regime. A survey of the FCC's decisions reveals that the FCC has consistently recognized that there is a compelling equity in preserving the cut-off status of the original applicant pool. In every case we could discover over those twenty years, the FCC has decided that the original applicants should be retained as the exclusive pool eligible to contest for the license under the new procedures, whether it be lottery or auction.[19] The sole exception to this rule – and again, this

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[19] *Maxcell Telecom Plus, Inc. v. FCC*, 815 F. 2d 1551 (D.C. 1987); *Filing Procedures in the MDS and ITFS Services*, 10 F.C.C.R. 9589, 9631 (1995); *Digital Audio Radio Satellite Service*, 12 F.C.C.R. 574 (1997); *Implementation of Section 309(j) of the Communications Act, Competitive bidding for commercial Broadcast and Instructional Fixed Television*

exception is followed with perfect consistency – is when the nature of the underlying license is itself being substantively changed along with the licensing procedure.[20] In this latter case, the FCC understandably sees no equity in preserving applications which were filed for a substantially different license, and it dismisses them to entertain new applications.

Most recently, the FCC had to decide what to do with mutually exclusive broadcast applications which were filed after July, 1997 and were therefore not subject to the automatic statutory protection afforded by Section 309(l) of the Act. The FCC decided to resolve these cases by auction, as authorized by the BBA, but it then had to determine whether or not the original applications should be retained as the exclusive pool eligible to participate in the auction. It ruled that the original pool should be retained on these grounds:

> These pending applicants timely filed complete long-form applications pursuant to our procedures then in place, with the reasonable expectation that their only competitors would be persons who similarly timely filed applications within the Commission's designated filing period. The reopening of filing windows would certainly not expedite the disposition of the pending applications or the commencement of

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Service Licenses and Issues Regarding Comparative Hearings, infra.

[20] *Amendment of Part 90 of the commission's Rules to Provide for the Use of the 220 MHz Band by the PLMRS*, 12 F.C.C.R. 10943, 11038-39 (1997).

> service to the public, but could produce further delays. Moreover, unlike situations where we have declined to hold an auction limited to pending applicants but preferred to permit the filing of applications by additional parties, the auction procedures adopted here make no substantial changes in the nature of the broadcast services or the rights and responsibilities of broadcast licensees.

Implementation of Section 309(j) of the Communications Act, Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses and Issues, Regarding Comparative Hearings, 13 F.C.C.R. 15920, 15958-60 (1998). This outcome was perfectly consistent with the FCC's unvarying treatment of pending applications as outlined above. Application of the same reasoning used by the FCC for pending broadcast applicants would have yielded a similar result for cellular applicants. Yet the FCC failed to do so.

Instead of addressing either its long-standing practice with respect to pending applications or its recent treatment of identically situated broadcast applications, the FCC Order under review simply ignored its own precedents entirely. App. at p. 39-41. It acted as though none of the considerations which it had regularly applied in the past even existed. On appellate review, Petitioners argued that the FCC had deviated from its past policies without explanation. *See*: *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-57 (1983). Because the FCC itself had offered no basis for the deviation, FCC appellate counsel suggested that in the broadcast case there was a need for

expedition in the provision of service whereas in the instant cellular case there was not. The Court of Appeals accepted this *post hoc* justification as a basis for distinguishing the FCC's treatment of the two seemingly similar sets of applicants[21] even though nothing in the FCC Order suggested that this was a distinguishing factor. *See* App. at p. 10, 17, note 29.

The Appeals Court's acceptance of this rationale from FCC counsel rather than from the agency itself plainly violated the oft-repeated injunction of this Court that an agency may not rely on grounds on appeal which it did not articulate in the order under review. "An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which the action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168-69 (1962) (a court must consider reasons given by agency in its order, not by agency counsel). This bedrock principle of administrative law is especially compelling when some twenty years of consistent precedent are being abandoned without a single word of explanation from the agency charged with regulating the field.

The upshot of all this is that even if Section 309(l) were deemed not to apply by its terms to the situation presented here, the FCC itself was required to acknowledge its consistent past policy with respect to pending applications and justify why that policy was ignored here. The Court of Appeals should have accepted no less.

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[21] App at p. 10.

CONCLUSION

A *writ of certiorari* should be granted to correct an obviously flawed construction of a statute intended by Congress to protect a wide range of commercial radio applicants before the FCC. In addition, the Appeals Court's decision raises the far-reaching question of how reviewing courts are to remedy erroneous findings as to the ambiguity of statutes under the analytic framework established by *Chevron*. Finally, the case presents a striking instance of an appellate court affirming an administrative agency's deviation from well-established policy on grounds not articulated by the agency itself, something which this Court has repeatedly condemned.

Respectfully submitted,

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December 8, 2003

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 11, 2003 Decided July 1, 2003

No. 02-1093

RANGER CELLULAR AND MILLER COMMUNICATIONS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

On Petition for Review of an Order of the
Federal Communications Commission

Donald J. Evans argued the cause and filed the briefs for petitioners.

Stanley R. Scheiner, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Page*, Acting Assistant Attorney General, U.S. Department of Justice, *Catherine G. O'Sullivan*, Chief Counsel, *Andrea Limmer*, Attorney, *John A.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Rogovin, Deputy General Counsel, Federal Communications Commission, and *Daniel M. Armstrong*, Associate General Counsel. *Pamela L. Smith*, Counsel, entered an appearance.

Before: GINSBURG, *Chief Judge*, and EDWARDS and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: Ranger Cellular and Miller Communications, Inc. (sometimes hereinafter referred to collectively as Ranger) petition for review of an order in which the Federal Communications Commission interpreted a provision in the Balanced Budget Act of 1997, Pub. L. No. 105–33, 111 Stat. 251, 47 U.S.C. § 309(*l*), to allow new applicants to apply for certain cellular telephone licenses. Ranger, which had submitted an application for a cellular license several years beforehand, argues that providers of cellular telephone service are "commercial radio or television stations" within the meaning of 47 U.S.C. § 309(*l*), for which the Commission may not accept new applications. The petitioner also claims that, even if the statute did not bar new cellular applications, the Commission departed from precedent in holding that the public interest would be served by its accepting new applications, and that the Commission opened the applicant pool with the unlawful purpose of enhancing federal revenues, in violation of 47 U.S.C. § 309(j)(7)(B). We reject Ranger's arguments and deny the petition for review.

I. Background

Prior to 1993 the Commission awarded licenses for use of the radio spectrum through either a comparative hearing or a lottery. Lottery entrants would file a simple application and pay a nominal fee. The Commission then held the lottery and determined a winner, subject to the losing parties' right to file a petition to disqualify the winner. If the winner was disqualified, then the Commission held another lottery. After 1986 the Commission used the lottery system exclusively to assign all cellular licenses.

The comparative hearing process, which required each party to present a detailed case to the Commission showing why it should win the license, was far more complex and often led to protracted litigation. *See, e.g., Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); DOUGLAS H. GINSBURG, MICHAEL H. BOTEIN, & MARK D. DIRECTOR, REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES 85–134 (West 2d ed. 1991). The Commission had used the comparative hearing process to choose among competing applications for broadcast stations since the decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

Ranger and Miller filed applications in 1988 and 1989 respectively to participate in a lottery for certain Rural Service Area (RSA) cellular telephone licenses. The Commission awarded most of the licenses but by the mid–1990s six licenses for RSAs were still pending due to the disqualification or withdrawal of the original winner. The Commission then granted interim operating authority (IOA) to cellular telephone licensees in adjacent areas to provide service until such time as the Commission awarded a permanent license. *See In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, Notice of Proposed Rule Making*, 16 FCC Rcd. 4296, ¶ 9 & n.21 (2001).

Meanwhile, the Congress, in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, § 6002(a), 107 Stat. 312, 387, had amended the Communications Act of 1934 by adding § 309(j), 47 U.S.C. § 309(j), which authorized the Commission to award almost all spectrum licenses by competitive bidding and limited the use of lotteries. With respect to cellular telephone licenses in particular, the 1993 legislation provided that the Commission: "shall not issue any license or permit [by lottery] ... unless ... one or more applications for such license were accepted for filing by the Commission before July 26, 1993." § 6002(e), 107 Stat. at 397. Having been given the option of proceeding by lottery or by competitive bidding to award such grandfathered licenses, the Commission decided initially to use a lottery, *see In the Matter of Implementation of Section 309(j) of the Communications*

Act–Competitive Bidding, 9 FCC Rcd. 7387 (1994), but then decided to study the matter further. *See Public Notice*, Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas, Mimeo No. 65051 (Sept. 10, 1996).

Before the Commission had finally decided how to award cellular telephone licenses, however, the Congress passed the Balanced Budget Act of 1997, Pub. L. No. 105–33, § 3002(a), 111 Stat. 251, which amended § 309(j) by requiring the Commission to use competitive bidding (except in a few specifically enumerated circumstances) and terminated the Commission's authority to use a lottery (except for a small class of broadcast licenses). *See* 47 U.S.C. § 309(i). More important for the purposes of this case, the Congress amended the Communications Act of 1934 by adding § 309(*l*), which states, under the heading "Applicability of competitive bidding to pending comparative licensing cases," that:

> With respect to competing applications for initial licenses or construction permits for *commercial radio or television stations* that were filed with the Commission before July 1, 1997, the Commission shall . . . treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding.

(Emphasis added). This section bars the Commission from accepting new applications for certain "commercial radio or television stations." The Conference Report on the 1997 Act described the scope of this provision as follows:

> The conferees adopted a new provision with respect to the applicability of competitive bidding to pending comparative licensing cases. New section 309(*l*) of the Communications Act requires the Commission to use competitive bidding to resolve any mutually exclusive applications for *radio or television broadcast licenses* that were filed with the Commission prior to July 1, 1997.

H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. at 573 (1997) (emphasis added).

Against this background, the Commission in April 1999 dismissed all pending applications for the cellular telephone licenses at issue in this case because it was "without authority to process the pending mutually exclusive RSA applications pursuant to the rules and requirements [of the lottery system] under which they were filed." *In the Matter of Certain Cellular Rural Service Area Applications*, 14 FCC Rcd. 4619, ¶ 5 (WTB 1999). In 2001 the Commission proposed to open eligibility with respect to the auctions it would hold for the pending RSA cellular telephone licenses. *See Implementation of Competitive Bidding Rules*, 16 FCC Rcd. ¶ 1. After receiving comments the Commission issued the order here under review. *In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 17 FCC Rcd. 1960 (2002) (*Order*).

The Commission rejected Ranger's argument that the term "commercial radio or television stations" in § 309(*l*) included cellular telephone licenses and therefore required the Commission to limit the pool of bidders to those who had filed an application prior to July 1, 1997. The Commission reasoned that the statute – by its terms and in accordance with its purpose and its legislative history – in using the phrase "commercial radio and television stations" referred only to broadcast stations and therefore did not cover cellular telephone services. The Commission went on to decide that competitive bidding with open eligibility would best serve the public interest: "the bidder who is willing to pay the most will be highly motivated to rapidly put the license to a use that the public finds valuable because only such a use will make its investment worthwhile." *Id.* ¶ 13. The Commission also rejected Ranger's comment that an auction would violate 47 U.S.C. § 309(j)(7)(b), which prohibits the Commission, in making certain regulatory decisions, from "bas[ing] a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." The Commission explained: "Our determination to permit open eligibility in the RSA auction is based on our statutory obligations to promote competition and rapid deployment of

services to rural areas, not to enhance the Federal Treasury." *Id.* ¶ 21.

The Commission conducted the auction for the RSA cellular licenses on June 4, 2002. Ranger did not participate.

II. Analysis

On appeal Ranger argues first that the Commission's interpretation of § 309(*l*) conflicts with the plain meaning of, and in any event, is not a reasonable reading of, the statute. Second, the petitioner maintains the Commission could not, consistent with precedent specifying the relevant equitable considerations, conclude that the public interest favored opening the auction to new applicants. Finally, the petitioner contends the Commission opened the auction unlawfully in order to maximize federal revenues.

We consider Ranger's first argument under the familiar two-step analysis of *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). First we determine "whether Congress has directly spoken to the precise question at issue;" if the Congress has so spoken, then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue," then we go on to determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. With respect to Ranger's other two arguments, our review is limited to determining whether the *Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A. Section 309(*l*)

Section 309(*l*) required the Commission, with respect to pending comparative license cases involving applications "for commercial radio or television stations," to limit the pool of applicants to those who had filed "competing applications for initial licenses or construction permits" before July 1, 1997. The Commission determined that a cellular telephone license is not a license for a "commercial radio or television station"

because the quoted phrase denotes only broadcast stations. *Order*, 17 FCC Rcd. ¶ 17.

Ranger offers several non-frivolous arguments that § 309(*l*) must be read to apply to licenses to provide cellular telephone service. First, Ranger notes that cellular service is regulated as a "commercial mobile radio service," 47 C.F.R. § 20.9(a), which seems to place it neatly within the more general class of "commercial radio and television stations" referenced in § 309(*l*). Relatedly, according to Ranger, when the Congress wanted to refer only to a broadcast station, it said either "broadcast station" or "broadcasting station." *See, e.g.*, 47 U.S.C. §§ 307(c), 311(c)(1), 315. Second, Ranger argues that the inclusion of the phrase "initial licenses or construction permits" in § 309(*l*) indicates the Congress intended to cover more than just broadcast stations because the Commission issues a "construction permit" only for a broadcast station, whereas an "initial license" is issued for a common carrier radio or a commercial mobile radio service. Therefore, the argument goes, the Commission's reading renders the phrase "initial license" superfluous. Ranger also points out that the Commission has sometimes referred to commercial mobile radio service as "commercial radio." *See, e.g., In re Application of 360 Degrees Communications Company*, 14 FCC Rcd. 2005 (1998). Finally, Ranger argues that we should disregard the legislative history of § 309(*l*) because it contravenes the plain meaning of the statute–which, of course, we would do if the meaning of the statute is plain on its face. *See Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear").

Although not without force, Ranger's arguments do not demonstrate that § 309(*l*) simply must be read as applying to cellular telephone licenses. First, the phrase "commercial radio and television stations" is not defined, nor is it used, in the 1997 Act outside the provision adding § 309(*l*) to the Communications Act. The Commission points out that the phrase "commercial radio" had been used, however, in both the Communications Act and the regulations promulgated thereunder, to mean only broadcast radio. *See, e.g.*, 47

U.S.C. § 158(g), 47 C.F.R. §§ 73.3526(e)(14), 73.3555(c)(2). The Commission then makes the point that the conjunction of "television stations," which are unquestionably engaged in broadcasting, with "commercial radio" in the same phrase suggests the Congress meant to cover only broadcast media, and thereby casts serious doubt upon the interpretation advanced by Ranger.

Furthermore, the heading of § 309(*l*) strongly favors the Commission's view that it does not apply to cellular telephone service. The heading – which was part of the 1997 Act, not a later addition by the Reviser – refers to "pending comparative licensing cases." This implies that the provision is inapplicable to cellular telephone services, licenses for which have not been the subject of comparative hearings since at least 1986. On the other hand, as of 1997 broadcast licenses had for more than 50 years been awarded through comparative hearings. The reference to comparative licensing in § 309(*l*) therefore implies the Congress meant to apply that section only to broadcast stations.

Hence we turn to the legislative history of § 309(*l*), which, although of distinctly lesser weight than an argument from the text of the 1997 Act, also supports the reading that limits § 309(*l*) to broadcast licenses. The Committee Report describes § 309(*l*) specifically as applying to "any mutually exclusive applications for radio or television *broadcast* licenses," not to the broader category of licenses for all radio and television stations. H.R. Conf. Rep. No. 217 at 573 (emphasis added). The use of the modifier "broadcast" in the report clearly implies that the Congress intended to limit the scope of § 309(*l*) to broadcast licenses.

We are led to conclude that the Congress has not directly spoken to the question whether § 309(*l*) covers only broadcast stations; the statute simply is not unambiguous on that score. We must go on to determine, therefore, whether the Commission has offered a reasonable interpretation of § 309(*l*).

From the foregoing discussion of the parties' positions, it is obvious that, for the same reasons the Commission's argu-

ments cast doubt upon the clarity of § 309(*l*), the agency offers a reasonable interpretation of the statute. Not surprisingly, therefore, Ranger proffers no reason to reject the Commission's interpretation apart from the reasons for which it argued the meaning of the statute is plainly otherwise. Again, the Commission has shown that § 309(*l*), viewed in the context of the 1997 Act, supports a reading that covers only broadcast stations. Although this reading is not the only possible interpretation of § 309(*l*), it is certainly a reasonable one and therefore commands our deference.

B. Public Interest

Ranger contends the Commission neither followed nor distinguished its precedents for determining whether to open a pending applicant pool to newcomers, *citing Competitive Bidding in the Broadcast Services*, 13 FCC Rcd. 15920 (1998); and *Filing Procedures in the MDS and ITFS Services*, 10 FCC Rcd. 9589 (1995) (*MDS Order*). According to the petitioner, the Commission failed to take account of the ordinary equitable considerations applicable to this issue, namely, the length of time the original applications had been pending (13 to 14 years), the number of original applicants (3), the potential for delay occasioned by opening the filing window, and whether the licenses to be auctioned were identical to those for which the original applications were filed (which they were). *See, e.g., MDS Order*, 10 FCC Rcd. ¶ ¶ 87–95. Ranger maintains that consideration of these factors leads inexorably to the conclusion that the Commission should not have accepted new applications.

We think the Commission reasonably applied appropriate factors to the circumstances of this case. The Commission first opined that open eligibility "generally favor[s]" the public interest because "maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public." *Order*, 17 FCC Rcd. ¶ 10. Opening the pool would be particularly useful in this case because otherwise there would be only three eligible bidders. *Id.* ¶ 19. Another "important factor in [the Com-

mission's] decision" was that the licenses covered rural areas, for which the Commission has a special responsibility under § 309(j)(4)(B) to promote the rapid development of service. *Id.* ¶ 14. And, the Commission added, the IOA licensees "may have a substantial interest in bidding for permanent authorizations in markets where they have been providing interim cellular service," *id.* ¶ 15.

The Commission has also properly distinguished its precedents. The *MDS Order*, the Commission noted, addresses not issues of eligibility, *see Order*, 17 FCC Rcd. ¶ 18 n.61, but whether to hold an auction or to conduct a lottery for the licenses there in question. *MDS Order*, 10 FCC Rcd. ¶ 88. In addition, the Commission explained that the concern expressed in *Competitive Bidding in the Broadcast Services* – that reopening the filing window would not "expedite ... the commencement of service to the public," 13 FCC Rcd. ¶ 108 – did not obtain in this case because customers in the RSAs were already receiving cellular telephone service from the IOA licensees. *See Order*, 17 FCC Rcd. ¶ 9 n.29. We conclude the Commission considered the relevant factors and did not act in an arbitrary and capricious manner in applying the public interest standard.

C. Revenue Enhancement

Finally, Ranger argues the Commission violated 47 U.S.C. § 309(j)(7)(B), which provides that "in prescribing regulations pursuant to Paragraph 4(A) of this subsection, the Commission may not base a finding of public interest, convenience and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." Specifically, Ranger contends the Commission opened the bidding to newcomers "solely or predominantly" for the purpose of enhancing what the licenses would fetch.

The Commission argues first that § 309(j)(7)(B) "applies only in specifically-enumerated circumstances, of which determining eligibility to participate in an auction does not appear to be one." The Commission maintains that, on the contrary, it "is charged with assigning spectrum to the party that

places the highest value on the use of the spectrum, because that party is presumed to be most likely to use the licenses efficiently."

The Commission clearly has the better of the argument here: Section 309(j)(7)(B) simply does not apply to this case. It applies only to regulations concerning "alternative payment schedules and methods of calculation" to be used in specifying the methodology of competitive bidding. So far as § 309(j)(7)(B) is concerned, therefore, the Commission is free to consider revenue enhancement when determining whether to expand the pool of eligible bidders.

Unfortunately, the Commission did not notice that § 309(j)(7)(B) was inapplicable to this proceeding until briefing the matter to this court. In the *Order* itself the Commission instead explained why it was in compliance with that provision. We do not ordinarily consider an argument made for the first time on review. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal"). In this case, however, we have no qualms about doing so: The statute is clearly inapplicable. Indeed, Ranger does not suggest otherwise, resting instead upon the Commission's tardiness in raising the point.

We would be tilting at a non-existent windmill were we to consider whether the Commission has complied with an inapplicable statute. *Cf. United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 447 (1993) ("a court may consider an issue antecedent to ... and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief") (internal quotation marks omitted); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below"). Surely, even if it has not complied, we would not, knowing that the statute

is inapplicable, require the Commission to close the auction to newcomers; to do so would thwart the clearly stated will of the Congress because of a temporary oversight by the Commission.

III. Conclusion

We conclude that the Commission offered a reasonable interpretation of an ambiguous statute, justified its decision under the public interest standard, and was not subject to 47 U.S.C. § 309(j)(7)(B). For those reasons the petition for review is

Denied.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Competitive	)	
Bidding Rules to License	)	WT Docket NO. 01-32
Certain Rural Service Areas	)	RM-8897

REPORT AND ORDER

Adopted: January 16, 2002 **Released:** January 28, 2002

By the Commission:

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I. INTRODUCTION

1. In the *Notice of Proposed Rule Making* in this proceeding (*Notice*),[1] we proposed rules for awarding licenses for four cellular Rural Service Areas (RSAs) that remain unlicensed because the initial lottery winner was disqualified or has otherwise withdrawn its application.[2]

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[1] In the Matter of Implementation of Competitive Bidding Rules To License Certain Rural Service Areas, *Notice of Proposed Rule Making*, 16 FCC Rcd 4296 (2001). A list of the commenting parties is included in Appendix A.

[2] There are currently four cellular RSA markets that remain unlicensed because the initial lottery winner was disqualified. These markets are: 332A – Polk, AR; 582A – Barnes, ND; 672A - Chambers, TX ; and 727A – Ceiba, PR. Three additional markets (370A – Monroe, FL; 492A – Goodhue, MN; and 615A – Bradford, PA) were the subject of recent Congressional action in which the Commission was directed to reinstate the original lottery winner in each of the three markets to tentative selectee status and proceed with processing the selectee's application for authority to operate. *See* District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, Title X, § 1007, 114 Stat. 2762, Launching Our Communities' Access to Local Television Act of 2000 (2000) (D.C. Appropriations Act of FY 2001); *Public Notice,* Wireless Telecommunications Bureau Grants Rural Cellular Licenses, 16 FCC Rcd 5601 (2001), recon. denied, In the Matter of Applications of Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and Futurewave Partners, L.L.C., *Memorandum Opinion and Order*, DA 01-2443 (CWD rel. Oct. 19, 2001) (application for review

Under the Balanced Budget Act of 1997 (1997 Budget Act), we are now required, with certain exceptions not applicable here, to resolve mutually exclusive applications for initial licenses by competitive bidding.[3] Based on the record compiled in this proceeding we have decided to implement the proposals put forth in the *Notice*, namely, to: 1) allow all eligible parties to apply for these initial licenses; 2) license these markets on an RSA basis under our Part 22 rules; and 3) use our Part 1 competitive bidding rules to auction these licenses.

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pending).

[3] Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997). Section 3002(a) provides that competitive bidding shall be used to resolve mutually exclusive applications for initial licenses and construction permits except in the case of public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations. 1997 Budget Act, Section 3002(a)(1)(A), *codified at* 47 U.S.C. § 309(j)(1), (2). Section 3002(a) further states that, with limited exceptions not applicable to this proceeding, "the Commission shall not issue any licenses or permits using a system of random selection under this subsection after July 1, 1997." 1997 Budget Act, Section 3002(a)(2)(B), *codified at* 47 U.S.C. § 309(i)(5).

II. BACKGROUND

2. The Commission has been awarding cellular licenses since 1982.[4] Under the original cellular licensing rules, one of the two cellular channel blocks in each market (the B block) was awarded to a local wireline carrier, while the other block (the A block) was awarded competitively to a carrier other than a local wireline incumbent.[5] After awarding the first thirty Metropolitan Statistical Area (MSA) licenses pursuant to comparative hearing rules, we adopted rules in 1984 and 1986 to award the remaining cellular MSA and RSA licenses through lotteries.[6] By 1991, lotteries had been held for every MSA and RSA, and licenses were awarded to the lottery winners in most instances. In some RSA markets, however, the initial

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[4] *See* An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Memorandum Opinion and Order on Reconsideration*, 89 F.C.C. 2d 58 (1982).

[5] *Id.*

[6] *See, e.g.*, Amendment of the Commission's Rules to Allow the Selection from Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C. 2d 175 (1984); Amendment of the Commission's Rules for Rural Cellular Service, *First Report and Order*, 60 Rad. Reg. 2d (P&F) 1029 (1986) (subsequent history omitted).

lottery winner was disqualified from receiving the license because of a successful petition to deny or other Commission action.[7] In these markets, the initial RSA license was never awarded, but under our former cellular lottery procedures, the remaining lottery applications remained pending. These procedures provided that, if the application of the tentative selectee were denied, a second lottery would be held among the remaining applicants or, in cases where multiple rank-ordered applicants were selected, the next ranked applicant would become the tentative selectee.[8]

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[7] In RSAs where there was no licensee, and none was expected for some time to come (*e.g.*, because an application was tied up in litigation before the Commission or the courts), the Commission was willing to grant "interim operating authority," or "IOA," to adjacent licensees to expand their existing system (*e.g.*, by increasing power at existing cell sites) to provide service in the unlicensed RSA. These IOAs were specifically conditioned on the IOA holder ceasing its operations in the RSA upon the initiation of service by the eventual licensee, provided 30 days advance written notice had been provided. *See Notice*, 16 FCC Rcd at 4301 & n. 21.

[8] *See Public Notice*, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective, Mimeo No. 63896 (July 12, 1996). *See also* former rule section 1.823(b)(3), 47 C.F.R. § 1.823(b)(3) (1991) (providing that if a winning application for an unserved area was dismissed, another lottery would be held to select an application from the remaining applicants). *See also* Amendment of the Commission's Rules

3. In the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), Congress added Section 309(j) to the Communications Act, authorizing the Commission to resolve mutually exclusive applications for use of the electromagnetic spectrum by auction.[9] In addition, Section 6002(e) of the 1993 Budget Act provided that: "[t]he Federal Communications Commission shall not issue any license or permit [by lottery] after the date of enactment of this Act unless . . . one or more applications for such license were accepted for filing by the Commission before July 26, 1993."[10] This provision left to the Commission's discretion whether to use auctions or lotteries for applications filed before July 26, 1993. Beginning in 1994,

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on the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries in the Public Land Mobile and Domestic Cellular Radio Telecommunications Services, *Order*, 4 FCC Rcd 7294 (1988) (amending rule section 1.823(a) to provide the Chief of the Common Carrier Bureau and the Managing Director with the authority to determine the number of applicants to be selected in each lottery). In 1988, the Chief of the Common Carrier Bureau and Managing Director routinely placed a number of tentative selectees in rank order and, for RSA lotteries, where an initial tentative selectee was disqualified, the next rank-ordered applicant would become the tentative selectee for the RSA market.

9 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993).

10 *Id.* at § 6002(e).

the Commission exercised its discretion and used lotteries, rather than auctions, to resolve already-pending mutually exclusive applications for cellular unserved areas filed prior to July 26, 1993.[11]

4. On July 12, 1996, the Wireless Telecommunications Bureau (Bureau) scheduled a lottery for September 18, 1996, for six RSA markets in which applications had been filed prior to July 26, 1993, and the original lottery winner had been disqualified.[12] This lottery was scheduled to resolve

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[11] *See* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7387 (1994). For mutually exclusive cellular unserved area applications filed after July 26, 1993, the Commission conducted an auction, which was concluded on January 21, 1997. *See Public Notice*, Cellular Unserved Areas Auction Closes; Winning Bidders in the Auction of 14 Licenses to Provide Cellular Service in Unserved Areas, 12 FCC Rcd 999 (1997).

[12] *Public Notice*, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective, Mimeo No. 63896 (July 12, 1996). The six markets that were to be included in this lottery were: RSA 332 (Arkansas 9 – Polk); RSA 370 (Florida 11 – Monroe); RSA 492 (Minnesota 11 – Goodhue); RSA 582 (North Dakota 3 – Barnes); RSA 615 (Pennsylvania 4 – Bradford); and RSA 727 (Puerto Rico 5 – Ceiba). As indicated in note 2, *supra*, the Commission has granted authorizations in three of these markets pursuant to Congressional directive.

mutually exclusive applications originally filed in 1989 for the six markets. On September 9, 1996, Cellular Communications of Puerto Rico (*CCPR*) filed a petition requesting that the Commission award these six licenses by auction instead of lottery.[13] On September 10, 1996, the Bureau postponed the lottery so that it could consider the issues raised by the petition.[14]

In other markets where the original lottery winner was disqualified, the Commission completed second lotteries. For example, a second lottery was completed for RSA 672A (Texas 21 – Chambers). However, the application of the tentative selectee from the second lottery for Market 672A, Alee Cellular Communications, was dismissed for lack of character qualifications. In the Matter of Application of Alee Cellular Communication for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672, *Memorandum Opinion and Order*, 15 FCC Rcd 2831 (2000) (*Alee Cellular*). Alee has filed a petition for reconsideration of that decision, which is still pending. Therefore, the cellular A block in Market 672 at present is unlicensed, resulting in four currently unlicensed RSA markets.

[13] Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, Or, in the Alternative, for Rulemaking, RM-8897 (filed Sept. 9, 1996) (*CCPR Petition*).

[14] *Public Notice*, Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas, Mimeo No. 65051 (Sept. 10, 1996). On April 17, 1997, the Coalition for Equity in Licensing filed a Petition for Writ of Mandamus with the U.S. Court of Appeals for the D.C. Circuit. The Petition asked the Court to order the

5. On August 5, 1997, the 1997 Budget Act was signed into law, modifying the Commission's auction authority by amending Section 309(j) of the Communications Act to require that all mutually exclusive applications for initial licenses or construction permits be auctioned, with certain exceptions not applicable here.[15] The 1997 Budget Act expressly repealed Section 6002(e) of the 1993 Budget Act,[16] and terminated the Commission's authority to award licenses through random selection, even in the case of applications filed prior to July 26, 1993, except for licenses for noncommercial educational and public broadcast stations.[17] Because the 1997 Budget Act terminated the Commission's remaining lottery authority,

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Commission to award the licenses at issue in this rulemaking proceeding by lottery. On June 27, 1997, the Court denied the Petition. *See In re: Coalition for Equity in Licensing, Petitioner*, No. 97-1272 (D.C. Cir. June 27, 1997).

[15] 1997 Budget Act, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997) (amending 47 U.S.C. § 309(j)).

[16] *Id.* at § 3002(a)(4).

[17] *Id.* at § 3002(a)(2)(B). The Commission had found in the *Competitive Bidding Second Report and Order* that mutually exclusive applications for initial licenses to provide cellular service were auctionable under the auction authority provided by the 1993 Budget Act. Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2359, ¶ 61 (1994) (*Competitive Bidding Second Report and Order*).

the Bureau dismissed all pending RSA lottery applications, including those in the six markets that had been designated for lottery in September 1996.[18] Several of the applicants

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[18] *See* In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (WTB 1999) (dismissing applications in RSAs 332A (Polk, AR), 370A (Monroe, FL), 492A (Goodhue, MN), 582A (Barnes, ND), 615A (Bradford, PA), and 727A (Ceiba, PR)); In the Matter of Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order*, DA 99-814 (CWD rel. Apr. 29, 1999) (dismissing applications in RSAs 599A (Nowata, OK) and 672A (Chambers, TX)); In the Matter of Certain Rural Service Area Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99-1426 (CWD rel. July 21, 1999) (reinstating applications of tentative selectees in those markets – Zephyr Tele-Link in RSA 599A and Alee in RSA 672A); In the Matter of Zephyr Tele-Link Application for a Construction Permit to Establish a Cellular System Operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service To Serve the Oklahoma 4-Nowata Rural Service Area, Market No. 599A, *Order* 15 RCC Rcd 4247 (CWD 2000) (granting application of Zephyr Tele-Link); *Alee Cellular*, note 12, *supra,* (recon. pending) (dismissing application of Alee). In the first dismissal order cited above, the Bureau also dismissed as moot CCPR's Petition requesting that we award licenses for the remaining RSA markets through competitive bidding. CCPR's Petition specifically requested that market 727A – Ceibo, Puerto Rico, be awarded through competitive bidding rather than through a second lottery. However, the CCPR Petition raised certain issues concerning the broader applicability of the use of competitive bidding for all markets where an initial lottery was held and

sought reconsideration of the Bureau's dismissal of the RSA applicants, and the Bureau declined to reconsider its actions earlier this year.[19]

6. As noted above, six markets were designated for relottery in September 1996. Of those six markets, licenses in three markets (370A – Monroe, FL; 492A – Goodhue, MN; and 615A – Bradford, PA) were granted pursuant to

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the winner was disqualified. We therefore treated the CCPR Petition as a petition for rulemaking and requested comment on awarding cellular licenses through competitive bidding for all remaining unlicensed RSAs. Although we dismissed CCPR's Petition as moot because we are required by the 1997 Budget Act to award licenses through competitive bidding, we have considered, and are incorporating into the record of this proceeding, all comments and reply comments submitted in response to the CCPR Petition. A list of commenters on the CCPR Petition is included in Appendix A.

[19] In the Matter of Certain Cellular Rural Service Area Applications, *Order,* 16 FCC Rcd 4619 (WTB 2001) (affirming dismissals) (*March 2, 2001 Order*). Ranger Cellular and Miller Communications, Inc. have sought further reconsideration of the Bureau's dismissal of the applications, and High Tower Communications, Inc. has sought Commission review of the Bureau's action. Consolidated Petition for Reconsideration of Ranger Cellular and Miller Communications, Inc. (filed Mar. 30, 2001); Application for Review of High Tower Communications, Inc. (filed Apr. 2, 2001).

Congressional action.[20] Thus, three markets remain to be licensed from the September 1996 lottery notice: 332A – Polk, AR; 582A – Barnes, ND; and 727A – Ceiba, PR. We also are including market 672A – Chambers, TX in this item, since no entity has yet been licensed in this market at this time.[21] Thus, these four markets are the subject of this *Report and Order*.

7. The *Notice*, released on February 12, 2001, specifically sought comment on a number of issues, including: 1) whether, if mutually exclusive applications are filed, the four RSA licenses should be awarded pursuant to the rules for competitive bidding set forth in Part 1 of our rules; 2) whether the four markets should continue to be licensed on an RSA basis or based on some other set of boundaries; and 3) the scope of eligibility to apply for and hold the subject licenses. We received opening comments from four parties, and one reply

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[20] *See* D.C. Appropriations Act of FY 2001, note 2, *supra*; *Public Notice,* Wireless Telecommunications Bureau Grants Rural Cellular Licenses, 16 FCC Rcd 5601 (2001), recon. denied, In the Matter of Applications of Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and Futurewave Partners, L.L.C., *Memorandum Opinion and Order*, DA 01-2443 (CWD rel. Oct. 19, 2001) (application for review pending).

[21] As discussed in note 12, *supra*, the application of the second tentative selectee of this market, Alee, was dismissed for lack of character qualifications, although a petition for reconsideration is pending.

comment, which was filed by one of the opening round commenters.[22] In addition, we have considered the comments and reply comments submitted in response to the *CCPR Petition*.[23]

III. DISCUSSION

A. Eligibility for Licenses

8. *Background.* In the *Notice,* the Commission proposed to allow all eligible entities to participate in an auction for the four cellular RSA licenses at issue in this proceeding.[24] We noted that our competitive bidding program seeks to award each license to the applicant that values it most highly and that is, therefore, most likely to offer valued service to the public.[25] We explained that excluding potential applicants that were not previously lottery applicants would be inconsistent with that goal.[26] We also recognized that, because nearly twelve years have passed since the closing of the original RSA filing window,

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[22] A list of parties that filed comments in response to the *Notice* is included in Appendix A.

[23] A list of parties that filed comments in response to the *CCPR Petition* is included in Appendix A.

[24] *Notice*, 16 FCC Rcd at 4300, ¶ 8.

[25] *Id.*

[26] *Id.*

a number of commenters that have expressed interest in participating in RSA auctions would not have had the opportunity to file applications, while some applicants that did file lottery applications may no longer exist.[27] Finally, we reasoned that, to the extent former lottery applicants continue to have an interest in applying for these markets, open eligibility allows them to do so.[28]

9. The Commission also specifically proposed to permit cellular operators that have been granted interim operating authority (IOA) in the four unlicensed RSAs to participate in the RSA auction.[29] We noted that although IOAs confer no interest or expectation of receiving a cellular license, IOA holders might have a substantial interest in bidding for permanent authorizations in markets where they may have been providing interim cellular service.[30]

10. *Discussion.* After careful consideration, we conclude that it is in the public interest to allow all entities,

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27 *Id.* at 4300-01, ¶ 8.

28 *Id.* at 4301, ¶ 8.

29 *Id.* at 4301, ¶ 9. In each of the four unlicensed RSAs, the Commission has granted interim operating authority to one or more cellular operators to provide cellular service on the Channel A block pending the ultimate permanent licensing of these RSAs.

30 *Notice*, 16 FCC Rcd at 4301, ¶ 9.

including current IOA holders and former lottery applicants, to participate in the RSA auction. In recent years, the Commission has generally favored open eligibility because we believe that maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public.[31] The Commission has found that this approach to auction participation best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act.[32] Further, we do not believe that there are any compelling

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31 *See, e.g., Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349-50, ¶¶ 3-5 (1994); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18617-20, ¶¶ 30-35 (1997); Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, *Report and Order*, 15 FCC Rcd 22709, 22736-37, ¶¶ 54-56 (2000) (*BBA Report and Order*). *But see, e.g., BBA Report and Order,* 15 FCC Rcd at 22737, ¶ 56 (the Commission has authority to restrict eligibility in particular cases if such restrictions are consistent with our spectrum management responsibilities under Section 309(j)).

32 47 U.S.C. § 309(j)(3)(A)-(D).

reasons to exclude potential participants in the upcoming RSA auction.

11. A number of commenters support open eligibility, particularly current IOA holders and entities that did not previously file lottery applications.[33] Cingular argues that permitting open eligibility will ensure that licenses are awarded to applicants that value them the most highly.[34] Cingular specifically insists that the Commission allow IOA holders in the subject markets to apply for licenses.[35] ALLTEL also supports the Commission's proposal to permit open eligibility.[36] BANM asserts that open eligibility will expedite cellular service to the RSA markets.[37] WWC urges the Commission to give all interested applicants an opportunity to provide cellular

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[33] With respect to eligibility, two of the four commenters that responded to the *Notice* support open eligibility. ALLTEL Comments at 1; Cingular Comments at 2; Cingular Reply Comments at 1-7. In addition, several commenters that responded to the *CCPR Petition* favored open eligibility. *See, e.g.,* BANM Comments at 2, 11; BANM Reply Comments at 2, 19-25; CCPR Reply Comments at 3, 13-16; Century Reply Comments at 1, 5-7; WWC Comments at 5-6.

[34] Cingular Comments at 2.

[35] *Id.*

[36] ALLTEL Comments at 1.

[37] BANM Comments at 11.

service in the RSAs.[38] Century contends that the number of potential service providers has increased in the years since the closing of the original RSA filing window and that broadening auction participation would permit the best qualified and most highly motivated entities to compete.[39]

12. Several commenters oppose open eligibility. Some of these commenters, such as Ranger and Miller, seek to restrict eligibility to former lottery applicants who continue to contest dismissal of their applications.[40] Other commenters argue that IOA holders should be barred from participating in the cellular RSA auction.[41] These

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[38] WWC Comments at 5-6.

[39] Century Reply Comments at 5.

[40] One commenter responding to the *Notice* contends that the auction should be restricted to former lottery applicants. Ranger and Miller Comments at 1-17. Commenters in response to the *CCPR Petition* also argue that the Commission should limit the auction to former lottery applicants. *See, e.g.,* AALA Comments at 9-10; AALA Reply Comments at iii, 11; CPLS Reply Comments at 3, 5-7; Crystal Reply Comments at 4; Price Comments at 6; RSAA Comments at 3, 5-6; RSAOG Comments at i, 1, 3, 6-8, 14-15; RSAOG Reply Comments at 1-4.

[41] *See, e.g.,* AALA Comments at iii, 13-15; AALA Reply Comments at iii, 10-11; Crystal Comments at 7-10; Crystal Reply Comments at 6; CPLS Comments at 11-12; Domencich Reply Comments at 6-7; Moving Phones Comments at 8-10; RSAA Comments at ii-iii, 2-5; RSAOG Comments at 2, 16; RSAOG

commenters generally contend that it is the Commission's policy, when it grants a party's application for IOA service, to dismiss that party's pending application for permanent authority for the subject market.[42] AALA claims that an IOA holder would have an advantage over other applicants in an auction because it would have a "unique ability" to calculate the value of the license.[43] In contrast, BANM and

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Reply Comments at 1-2.

[42] *See, e.g.,* RSAA Comments at 4 (the purpose of the policy is to "assure that the fact of interim operation and concomitant investment should not in any way influence the FCC's selection of the ultimate licensee").

[43] AALA Comments at 14-15. Several commenters cite to *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). *See, e.g.*, AALA Comments at 14 (to allow one applicant to operate in a market under temporary authority poses a severe threat to the principles set forth in *Ashbacker*). We note that short-form applications to participate in competitive bidding are governed by Section 309(j), and not the procedural requirements of Sections 309(a), 309(b), or 309(e), or the *Ashbacker* doctrine, which requires a comparative hearing when competing applicants file conflicting license or construction permit applications for the same authorization. *See* Elleron Oil Co. and WVI Partners, Inc. Petition for Reconsideration of Dismissal of Short-Form Applications for Interactive Video and Data Service Auction, *Order*, 13 FCC Rcd 17246, 17251-52, ¶ 9 (WTB 1998). Section 309(j) does not require the Commission to use a notice and cut-off procedure or establish "cut-off dates" to invite mutually exclusive applications for a particular license. *See id.* at 17250, ¶ 8.

CCPR argue that the Commission's policy for excluding IOAs was implemented to avoid unfair advantage in the comparative hearing process and thus is not relevant when licenses are assigned by competitive bidding.[44]

13. In determining eligibility for auction participation, the Commission is required by Section 309(j)(3) to promote certain public interest objectives. Those objectives include rapid deployment of new technologies and services to the public, promotion of economic opportunity and competition, recovery for the public of a portion of the value of the spectrum, and efficient and intensive use of the spectrum.[45] We believe that a policy of unrestricted eligibility in the RSA auction will best fulfill our public interest goals. Here, open eligibility has a higher probability of promoting the rapid delivery of services to the public than limited eligibility. This is because open eligibility increases the likelihood that all entities who have an interest in putting the license to use will participate in the auction. Among these, the bidder who is willing to pay the most will be highly motivated to rapidly put the license to a use that the public finds

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[44] BANM Reply Comments at 22-24; CCPR Reply Comments at 13-14 (the Commission rightfully was concerned that ordinary human decision-makers would be influenced by the fact that interim operators had invested money constructing facilities and had experience in service to the public that the other applicants lacked).

[45] 47 U.S.C. § 309(j)(3)(A)-(D).

valuable because only such a use will make its investment worthwhile. Importantly, no commenter has presented evidence in this case that there are entities with market power whose participation might allow them to limit or reduce competition by their entry. In such a situation, permitting as many qualified bidders as possible allows competition and economic opportunity to flourish by reducing one barrier to market entry, potentially resulting in a more competitive applicant pool. In the absence of evidence of market failure, the market, and not regulation, should determine participation in competitive bidding here, and we should allow the maximum number and types of bidders to participate in the auctions.

14. An important factor in our decision to permit open eligibility is that the licenses at issue in this proceeding will cover rural areas. Under Section 309(j)(4)(B), the Commission is required to encourage the rapid deployment of services specifically to rural areas.[46] BANM also highlights the need for the provision of service in rural markets, stating that, "[w]hile many urban markets have enjoyed cellular service for as long as thirteen years, these rural service areas have remained without a permanent nonwireline cellular licensee."[47] We believe that open eligibility will encourage participation in the RSA auction by entities that are most likely to be interested in, and capable of, serving rural areas.

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[46] 47 U.S.C. § 309(j)(4)(B).

[47] BANM Comments at 10-11.

15. Our decision to permit open eligibility in the RSA auction includes the participation of current IOA holders in the four unlicensed RSAs. The Commission's policy to dismiss applications for permanent status filed by IOA holders originated in the context of comparative hearings, based on the concern that the decision to grant a license in a comparative hearing would be biased in favor of an IOA holder because it had incurred substantial expenses in its temporary operations.[48] We decline to extend that policy to the competitive bidding process. IOA holders will not have an advantage over other bidders as they once had over other applicants in comparative hearings because, in an auction, licenses are assigned to the highest bidder, regardless of prior operating status.[49] As we stated in the *Notice,* although IOAs confer no entitlement to, or

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[48] *See* In re Applications of La Star Cellular Telephone Co. and New Orleans CGSA, Inc, *Memorandum Opinion and Order,* 4 FCC Rcd 3777 (1989), *aff'd*, 899 F.2d 1233 (D.C. Cir 1990). *See Community Broadcasting Co. v. FCC,* 274 F.2d 753 (D.C. Cir. 1960) (an interim operator's expenditure of sizeable funds on its temporary operation would inevitably influence the Commission's final decision, no matter how much the Commission tried to eliminate this factor).

[49] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *Memorandum Opinion and Order*, 14 FCC Rcd 8724, 8737-39, ¶¶ 23-26 (1999) (the Commission rejected arguments that holders of interim authority have a comparative advantage in an auction process).

expectation of, receiving a cellular license, IOA holders may have a substantial interest in bidding for permanent authorizations in markets where they have been providing interim cellular service.[50] Given our previously adopted policies and the record in this proceeding, we conclude that current IOA holders should not be excluded from participating in the auction of licenses for the unlicensed RSAs on an equal basis with other applicants.

16. Joint commenters Ranger and Miller raise a variety of statutory and equitable arguments against open eligibility, none of which we find persuasive. First, Ranger and Miller argue that Section 309(l) of the Communications Act of 1934, as amended, restricts eligibility for cellular radio licenses to lottery applicants that filed their applications prior to July 1997 and whose applications allegedly are "unresolved."[51] Section 309(l) provides in pertinent part that, with respect to competing applications for initial licenses for "commercial radio and television stations" that were filed with the Commission before July 1, 1997, the Commission shall treat the persons filing such applications as the only persons eligible to be

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[50] *Notice*, 16 FCC Rcd at 4301, ¶ 9.

[51] Ranger and Miller Comments at 4-6. Ranger, Miller, and High Tower Communications sought further review of the *March 2, 2001 Order* dismissing all pending RSA lottery applicants. Ranger and Miller describe these applications as "unresolved."

qualified bidders.[52] Ranger and Miller contend that the Commission's rules define cellular radio[53] as a "commercial mobile radio service" and that, therefore, the reference to "commercial radio" in Section 309(l) includes cellular radio.[54] Cingular disagrees with Ranger and Miller, asserting that the Commission should not view "commercial radio" and "television stations" as distinct, unrelated terms.[55] Cingular maintains that the term "commercial" was intended to exclude *noncommercial educational radio and television* applications from the scope of Section 309(l) and from competitive bidding under Section 309(j)(2)(C).[56]

17. We agree with Cingular's interpretation of the statutory language, which is plain on its face. The statute does not use "commercial radio" and "television stations" as distinct terms. Rather, the reference in the statute to "commercial radio and television stations" clearly refers to

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52 Pub. L. No. 105-33, § 3002(a)(3), 111 Stat. 251, 260 (1997) (*codified at* 47 U.S.C. § 309(l)).

53 47 C.F.R. § 20.9.

54 Ranger and Miller Comments at 5.

55 Cingular Reply Comments at 2.

56 *Id.* at 2-3.

broadcast facilities.[57] Where Congress has referred to wireless services like cellular in other provisions of the Communications Act of 1934, as amended, it has clearly

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[57] Contrary to the claim of Ranger and Miller, *Bachow Communications, Inc. v. FCC* does not support the notion that Section 309(l) applies to cellular RSA applications as well as broadcast license applications. Ranger and Miller Comments at 5-6; *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) (*Bachow*). *Bachow*'s central holding instead is that license applications for 39 GHz service filed under a comparative hearing licensing scheme could be dismissed when the Commission shifted to an auction licensing scheme. *Bachow*, 237 F.3d at 686-688 (recognizing the "Commission's authority to change license assignment allocation (*sic*) procedures midstream" even though it disrupts expectations and alters the competitive balance among applicants). Ranger and Miller also cite the D.C. Circuit's opinion in *McElroy* to support their argument that the Commission cannot make the RSA licenses available to new applicants. Ranger and Miller Comments at 16-17; *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) (*McElroy);see, e.g.*, AALA Comments at 9-10; AALA Reply Comments at iii, 11; CPLS Reply Comments at 3, 5-7; Crystal Reply Comments at 4; Price Comments at 6; RSAA Comments at 3, 5-6; RSAOG Comments at i, 1, 3, 6-8, 14-15; RSAOG Reply Comments at 1-4. *McElroy* holds that when the Commission decides to process timely-filed applications, it generally may not also process competing applications filed out of time. *McElroy*, 86 F.3d at 253-259. Because we will permit open eligibility for the subject licenses, and all applications to participate in the auction will be newly filed, the *McElroy* decision is inapposite.

used the term "commercial mobile services."[58] As the Supreme Court has explained, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[59] The legislative history also confirms that Section 309(l) applies only to commercial broadcast radio and television applications. The Conference Report specifically states that "[n]ew section 309(l) of the Communications Act requires the Commission to use competitive bidding to resolve any mutually exclusive applications for *radio or television broadcast licenses* that were filed with the Commission prior to July 1, 1997."[60]

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[58] *See, e.g.*, 47 U.S.C. §§ 253(e), 274(i)(2)(B), 332(c)(1), 332(d)(1).

[59] *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted), citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

[60] H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. at 573 (1997) (*Conference Report*) (emphasis added). The Commission has applied Section 309(l) only to pending comparative broadcast licensing cases. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920 (1998) (*Broadcast First Report and Order);* recon. denied, 14 FCC Rcd 8724 (1999); modified, 14 FCC Rcd 12541 (1999); *see* In the Matter of Amendment of Section

18. Ranger and Miller also offer up a litany of equitable arguments that they contend support artificially limiting eligibility. They argue that the Commission should limit the RSA applicant pool because the number of unresolved lottery applicants is small, the applications have been pending for thirteen years, the service rules for RSA licenses have not changed, and the lottery applicants did not have notice when they filed their applications that competitive bidding, rather than lotteries, might be used to assigned licenses.[61] In addition, Ranger and Miller oppose open eligibility on the grounds that the Commission did not refund their lottery application filing fees,[62] and that

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73.202(B), FM Table of Allotments, FM Broadcast Stations, *Memorandum Opinion and Order,* 16 FCC Rcd 2272 (2001).

[61] Ranger and Miller Comments at 1, 7-10, 12-13. Ranger and Miller suggest that the *MDS Report and Order* and the *Broadcast First Report and Orders* considered various equities to limit eligibility. *See* Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 9589 (1995) (*MDS Report and Order*); *Broadcast First Report and Order*, note 60, *supra*. Neither the *MDS Report and Order* nor the *Broadcast First Report and Order* address eligibility issues and are therefore not relevant as to whether we should restrict eligibility in the RSA auction.

[62] Ranger and Miller Comments at i, 9, 12-13. Ranger and Miller argue that the Commission should restrict eligibility because Miller helped the Commission determine that a

open eligibility will lead to delay and litigation.[63]

19. Ranger and Miller fail to show how the public interest would be served by limiting the RSA auction to only three former lottery applicants.[64] In fact, it is well-established that, regardless of when an application is filed, an applicant has no vested right to a continuation of the licensing procedures in effect at the time its application was filed.[65] Moreover, there is no logical nexus between

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cellular RSA licensee was unqualified to hold a RSA license. Ranger and Miller Comments at 10-12. We disagree. Any action by Miller that may have led the Commission to such a determination is irrelevant to our decision whether we should, as a general rule, adopt open eligibility with respect to the four cellular RSA markets. We are obligated to promote the public interest, not individual applicants.

[63] Ranger and Miller Comments at i, 7-10, 12.

[64] Ranger and Miller raise the same equitable arguments seeking reconsideration of the dismissal of cellular RSA lottery applications. Petition for Reconsideration of Ranger Cellular and Miller Communications, Inc. (filed March 30, 2001).

[65] *See, e.g.*, *Bachow*, 237 F.3d at 687-688; Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10038, ¶ 8 (1999); *Broadcast First Report and Order*, 13 FCC Rcd at 15937, ¶ 44; Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to

the length of time the applications were pending and the rationale for restricting eligibility to bid in the RSA auction. Similarly, the claim that the lottery applicants did not have any notice of possible rule changes at the time they filed their applications provides no reasonable rationale for the proposed narrowing of eligibility. The Commission's action declining to refund application filing fees neither gives the applications continued "life" nor justifies restrictions on eligibility. Finally, the Commission necessarily is guided by the public interest objectives set forth in Section 309(j)(3)(A)-(D) in setting application eligibility and not by concerns over the prospects of litigation and appeals.[66]

20. In fact, Ranger and Miller totally disregard the equities of other parties potentially interested in seeking the subject authorizations, as well as equitable considerations relevant to the public interest. As we found above, adopting open eligibility – the antithesis of the licensing plan promoted by Ranger and Miller – for these licenses has a greater probability than limited eligibility of resulting in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use

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Redesignate the 27.5-29.5 GHz Frequency Band, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4941, ¶ 195 (1998), citing *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997).

[66] 47 U.S.C. § 309(j)(3)(A)-(D).

of the spectrum.[67] Such a result would promote the public interest, and therefore, open eligibility is warranted. In addition, it is important to recognize that there may be parties interested in providing cellular service in these markets, and qualified to do so, that did not even exist at the time the lottery applications were filed.

21. Finally, Ranger and Miller argue that an open eligibility policy in this context must necessarily be based on the potential for increased revenue to the Treasury.[68] Section 309(j)(7)(B) does not preclude the Commission from adopting eligibility rules based on other considerations, even though such rules may also result in increased federal revenues. The purpose of open eligibility is not to maximize the amount of revenues raised in an auction but to ensure that licenses are awarded to those that value them most highly and that, therefore, will be most likely to provide rapid and efficient service to the public.[69] Our determination to permit open eligibility in the RSA auction is based on our statutory obligations to promote competition and rapid deployment of services to rural areas, not to enhance the Federal Treasury.

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[67] *See* ¶¶ 10, 13-14, *supra*.

[68] Ranger and Miller Comments at i, 13-15.

[69] By asserting that auction revenues will be greater if they are forced to compete with a larger number of bidders, Ranger and Miller may be suggesting that they value the RSA licenses less highly than their potential competitors.

B. Market Areas To Be Auctioned

22. *Background.* In the *Notice,* we sought comment on whether the markets for which licenses are to be awarded through competitive bidding should be based on RSAs, or whether alternative licensing models should be considered.[70] We received two comments that supported licensing the markets on an RSA basis,[71] and no party expressed opposition to that proposal.

23. *Discussion.* We conclude that the remaining unlicensed cellular RSA markets should be licensed on an RSA basis under our Part 22 rules. As we observed in the Notice, the initial lotteries for the unlicensed markets were for RSAs as defined in Part 22 of our rules.[72] To employ another market model for these RSAs would be potentially disruptive to adjacent cellular operations, as well as possibly impede the cost-effective buildout of facilities to serve the residents of these areas as well as transient users. We also will subject licenses awarded for these markets to the same construction and operational rules as licenses granted to prior RSA lottery winners, including the exclusive right of the auction winner to expand its system

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70 *Notice*, 16 FCC Rcd at 4301-4302, ¶¶10-11.

71 Ranger and Miller Comments at 15; ALLTEL Comments at 1.

72 *Notice*, 16 FCC Rcd at 4302, ¶ 11; 47 C.F.R. § 22.909.

within that market for a period of five years.[73] After the expiration of the five-year expansion period, any areas within the RSA that remained unserved would be available for licensing pursuant to our Part 22 unserved areas Phase I and Phase II filing procedures.[74]

C. Competitive Bidding Procedures

1. Incorporation by Reference of Part 1 Standardized Auction Rules

24. *Background.* In the *Part 1 Third Report and Order*, the Commission streamlined its auction procedures by adopting general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules applicable to all auctionable services.[75] In the *Notice*, we proposed to

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[73] 47 C.F.R. § 22.947.

[74] 47 C.F.R. § 22.949.

[75] Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by Erratum, DA 98-419 (rel. March 2, 1998)) (*Part 1 Third Report and Order*). The Commission clarified and amended these general competitive bidding procedures. Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (modified

with the general competitive bidding rules,[76] including any amendments adopted in the ongoing Part 1 proceeding.[77] Specifically, we proposed to employ the Part 1 rules governing competitive bidding design, designated entities, application and payment procedures, reporting requirements, collusion issues, and unjust enrichment.[78] We further stated that winning bidders would be eligible to obtain a bidding credit for serving qualifying tribal lands.[79]

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by Erratum, DA 00-2475 (rel. Nov. 3, 2000)) (*Part 1 Order on Reconsideration*) (recons. pending). More recently, the Commission adopted modifications to Section 1.2105(c) of the Commission's rules, the competitive bidding "anti-collusion rule." Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, WT Docket No. 97-82, *Seventh Report and Order,* FCC 01-270 (rel. Sept. 27, 2001). *See also* 47 C.F.R. § 1.2101 *et seq.*

[76] *Notice*, 16 FCC Rcd at 4302, ¶ 12.

[77] *Id.*

[78] *Id.*

[79] *Id. See* 47 C.F.R. § 1.2110(f)(3). A tribal land bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal land bidding credit after winning the auction when it files its long-form application. In this regard, we note that only one RSA subject to these proposals — RSA 582A-Barnes, ND — contains any federally recognized tribal lands.

Finally, our *Notice* contemplated that auction-related procedural matters such as the appropriate competitive bidding design for the RSA auction, as well as minimum opening bids and reserve prices, would be determined by the Bureau pursuant to its delegated authority prior to the start of the cellular RSA auction.[80]

25. *Discussion.* We adopt our proposal to conduct the auction for initial licenses in the four cellular RSAs in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules. We believe that this decision to conduct the RSA auction in conformity with the standardized Part 1 rules will increase the efficiency of the competitive bidding process and provide specific guidance to auction participants.

26. Although we received few comments on this issue, none of the commenters opposed the application of the general competitive bidding rules. One commenter, Cingular, favors application of the general competitive bidding rules to the RSA auction.[81] In its comments, Cingular also requests that the bidding design ultimately

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[80] *Notice,* 16 FCC Rcd at 4302-4303, ¶ 12. *See* 47 C.F.R. §§ 0.131(c), 0.331, and 0.332; *see also* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making,* 12 FCC Rcd 5686, 5697, ¶ 16 (1997).

[81] Cingular Comments at 1, 3.

selected not include combinatorial bidding,[82] arguing that it is inappropriate where no "synergies" exist among the markets in question.[83] As indicated in the Notice, the Bureau will seek comment by Public Notice on auction-related procedural issues, including the appropriate competitive bidding design, prior to the start of the cellular RSA auction. This approach will provide the Bureau with an opportunity to weigh the benefits and disadvantages of combinatorial bidding design, among other auction-specific issues.

2. Small Business Definitions and Bidding Credits.

27. *Background.* In the *Notice,* we proposed to adopt special provisions for small businesses that participate in the auction for cellular RSA licenses.[84] We noted that the markets at issue could attract a wide range of entities and the adoption of bidding credits will help us meet our Congressional mandate to promote competition and to disseminate licenses among a wide variety of applicants.[85] Accordingly, we proposed to define an entrepreneur as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, a small business as

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82 Combinatorial bidding design allows for bids on combinations or packages of licenses.

83 Cingular Comments at 3.

84 *Notice,* 16 FCC Rcd at 4303, ¶ 13.

85 *Id.* at 4303, ¶ 14.

an entity with average annual gross revenues for the preceding three years not exceeding $15 million, and a very small business as an entity with average annual gross revenues for the preceding three years not exceeding $3 million.[86] We further proposed, as provided in Section 1.2110(f)(2) of our rules, to offer entrepreneurs a bidding credit of 15 percent, small businesses a bidding credit of 25 percent, and very small businesses a bidding credit of 35 percent.[87]

28. We sought comment on whether the characteristics and capital requirements of cellular service call for a different approach.[88] We also asked commenters, to the extent that they propose additional provisions to ensure participation by businesses owned by minorities and

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[86] *Id.* The entrepreneur and small business definitions are consistent with the small business definitions we established for the broadband Personal Communications Services C and F blocks. We also proposed the definition of very small business for the RSA auction because smaller businesses may be interested in acquiring licenses to provide service in these markets. The Small Business Administration approved these proposed small business definitions on January 30, 2001. *See* Letter from Fred P. Hochberg, Acting Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated Jan. 30, 2001.

[87] *Notice,* 16 FCC Rcd at 4303, ¶ 14.

[88] *Id.* at 4304, ¶ 15.

women, to address how such provisions should be crafted to meet the relevant standards of judicial review.[89]

29. *Discussion.* As we tentatively concluded in the Notice, we will adopt the following small business definitions and bidding credits: (1) an "entrepreneur" with average annual gross revenues for the preceding three years not exceeding $40 million will be eligible for a 15 percent bidding credit; (2) a "small business" with average annual gross revenues for the preceding three years not exceeding $15 million will be eligible for a 25 percent bidding credit; and (3) a "very small business" with average annual gross revenues for the preceding three years not exceeding $3 million will be eligible for a 35 percent bidding credit.

30. We received two comments that addressed special provisions for small businesses. Ranger and Miller believe that bidding credits should be adopted to encourage small businesses to bid and win licenses,[90] while ALLTEL opposes such adoption.[91] ALLTEL argues that the cellular industry has evolved into a "mature" service that is occupied by national and super regional carriers that are better situated to incorporate rural service into the "larger

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89 *Id.*

90 Ranger and Miller Comments at 15.

91 ALLTEL Comments at 1-3.

scope and scale of their existing operations."[92] ALLTEL maintains that small businesses may have difficulty remaining economically viable unless they affiliate with larger carriers.[93] If large carriers ultimately manage the RSA markets, ALLTEL argues that they should therefore have an "equal shot of obtaining the license in the first instance."[94] Accordingly, ALLTEL concludes that bidding credits should not be adopted because promoting small business ownership of stand-alone rural cellular markets in

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[92] *Id.* at 1-2. ALLTEL also believes that such integration will ultimately benefit consumers in the form of lower rates than might be available from stand-alone rural markets. *Id.* at 3.

[93] *Id.* at 2 (ALLTEL claims that the auction winners in the RSA markets at issue here may ultimately obtain management, switching facilities, and cellular infrastructure from larger adjoining carriers).

[94] *Id.* at 2-3. To support its argument that all applicants should have "an equal footing" in the RSA auction, ALLTEL cites to a Commission statement in the *Notice*. *See Notice*, 16 FCC Rcd at 4301, ¶ 9. ALLTEL argues that the Commission's proposal to allow current IOA holders to participate in the RSA auction on an equal basis with other applicants somehow implies that the Commission would reject bidding credits. However, ALLTEL's argument is misplaced. Our tentative conclusion in the *Notice* referred to the question of eligibility, not bidding credits.

the "mature" cellular industry would be contrary to market realities.[95]

31. We are not persuaded by ALLTEL's arguments. We do not believe that large carriers are necessarily better suited to provide cellular RSA service, as suggested by ALLTEL. In any case, the Commission does not prescreen applicants' relative qualifications. Further, we believe that competition between large and small entities will benefit subscribers in the rural markets. We are also not persuaded that the adoption of bidding credits will, in any way, impede service to these areas. To the extent that, as ALLTEL suggests, cellular service is a national "mature" service dominated by large carriers, our decision to adopt bidding credits should help eliminate barriers to entry for small businesses, consistent with our statutory mandate.[96]

32. Finally, ALLTEL contends that the auction will be skewed toward smaller entities that receive an overly generous bidding credit, which will distort market valuation.[97] While we agree that bidding credits provide small businesses with an advantage, Congress, in Section 309(j), specifically directed the Commission to promote economic opportunities for small businesses. We further note that bidding credits alone do not guarantee success;

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95 ALLTEL Comments at 1-2.

96 *See* 47 U.S.C. § 309(j)(3)(B).

97 ALLTEL Comments at 2-3.

rather, they provide small businesses with an opportunity to successfully compete against larger, well-financed bidders.[98] Because bidding credits are the best tool we have to promote these opportunities, we conclude that it is appropriate to adopt the special provisions for small businesses.

33. We will not adopt special preferences for entities owned by minorities or women. As the Commission did not receive any comments on this issue, we do not have an adequate record to support such special provisions under the current standards of judicial review.[99] We believe the bidding credits we adopt here for small businesses will further our objective of disseminating licenses among a wide variety of applicants. Furthermore, minority and women-owned entities that qualify as small businesses may take advantage of the special provisions.

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[98] *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2811, ¶ 178 (1997).

[99] *See Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

D. Disposition of Alee's Argument Concerning Texas 21

34. In its comments,[100] Alee has requested that RSA 672A (Texas 21 – Chambers) not be included in any upcoming auction pending the outcome of its petition for reconsideration of an order denying its application in that market.[101] For the reasons stated below, we deny Alee's request and include the Texas 21 RSA authorization among the markets to be subject to auction rules.

35. The Commission based its decision to deny the application for Texas 21 on a prior finding that Alee had lacked candor before the Commission in its application for authorization to operate New Mexico RSA 3, and was therefore not suitable under the Commission's character qualifications to be a Commission licensee.[102] The U.S. Court of Appeals for the D.C. Circuit recently upheld the Commission's determination of lack of candor, and subsequently denied Alee's petition for rehearing.[103] The

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100 Alee Comments at 2.

101 *See Alee Cellular,* note 12, *supra.*

102 In re Applications of Algreg Cellular Engineering, 12 FCC Rcd 8148, 8172-8181, ¶¶ 51-79, 8190, ¶ 104 (1997), recon. denied, 14 FCC Rcd 18524, 18533-18535, ¶¶ 12-16, 18538, ¶ 26 (1999).

103 *Alee Cellular Communications v. FCC*, No. 99-1460 (D.C. Cir. Jan. 30, 2001), pet. for rehearing denied (D.C. Cir. Apr. 5, 2000).

Supreme Court has recently denied Alee's petition for a writ of certiorari.[104]

36. Alee requests that, if we include the Texas 21 authorization in the contemplated auction, the Commission give notice to any potential bidder that any license won in that market would be subject to Alee's claim. If Alee ultimately prevails in the hearing process, the license will be awarded accordingly. If Alee does not prevail, then we will have the necessary licensing rules and policies in place for the Texas 21 authorization without having to conduct another rulemaking proceeding. We will ensure that interested parties are fully informed to the extent that Alee's claim remains unresolved.

E. IOA Operations

37. *Background.* Under the terms of each of the existing IOAs, the IOA operator must cease operations immediately upon initiation of service by the new licensee, provided that the new licensee gives at least 30 days written notice of its intent to provide service.[105] In order to

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[104] *Alee Cellular Communications v. FCC*, No 01-15, pet. for writ of cert. denied (S. Ct. Oct. 9, 2001).

[105] *Notice*, 16 FCC Rcd at 4301, ¶ 9. The IOA condition specifically provides that "[t]he interim operator must fully cooperate with the permanent licensee in effectuating a smooth transition to the provision of service in the market by the permanent licensee without *disruption* of service to the public.

prevent unnecessary interruption of service to existing cellular customers, we proposed in the *Notice* that, in the event that any of the current IOA holders do not obtain the RSA license for their markets, they should be allowed to continue providing service on a temporary basis subject to these conditions, *i.e.*, until the auction winner provides the required notice and is prepared to commence service.[106] Cingular requests that the Commission clarify its rules to provide that interim operators may continue to operate until the auction winner is prepared to commence service in that particular part of the market where the IOA holder is operating in order to avoid disruption in service to the public.[107]

38. *Discussion.* Because of the nature of these markets and carrier buildout practices, we anticipate the auction winner will not initially provide coverage throughout the entire market. As a result, the auction winner may or may not initiate service in the area where the public currently is receiving service from the IOA holder. We will require the

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The interim operator must cease operations in the market on the date of initiation of permanent service or within 30 days of written notice by the permanent permittee to the interim operator of the day and time that it intends to initiate service, whichever date occurs later."

[106] *Id.* Minimizing such interruptions while the auction winner establishes its service will also help to retain 911 access in the IOA service area.

[107] Cingular Comments at 1, 2-3.

IOA holder to "pull back" its service area boundaries (SAB) to eliminate any overlap with the auction winner's own SAB, and to terminate service in the RSA upon notice from the auction winner that the latter is extending coverage into the area served under the IOA. We feel that this will best serve the public interest by preventing localized disruptions in service during the transition period.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

39. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 603, the Final Regulatory Flexibility Analysis (FRFA) is set forth in Appendix C. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

B. Ordering Clauses

40. Pursuant to 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i),

303(r) and 309(j), IT IS ORDERED THAT Part 22, 47 C.F.R. is AMENDED as specified in Appendix B and the auctions for Markets 322A – Polk, AR, 592A – Barnes, ND, 727A – Ceiba, PR, and 672A – Chambers, TX be conducted under Part 1, Subpart Q of the Commission's rules, 47 C.F.R. § 1.2101 *et seq.*, and that all eligible parties be permitted to participate in the bidding.

41. IT IS FURTHER ORDERED THAT the rules and policies adopted in this Report and Order shall become effective thirty days after publication in the Federal Register.

42. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

COMMENTING PARTIES

NOTICE COMMENTS
Cingular Wireless, LLC (Cingular)
Ranger Cellular and Miller Communications, Inc. (Ranger and Miller)
ALLTEL Communications, Inc. (ALLTEL)
Alee Cellular Communications, Inc. (Alee)

NOTICE REPLY COMMENTS
Cingular Wireless, LLC (Cingular)

CCPR PETITION COMMENTS
Applicants Against Lottery Abuse (AALA)
Bell Atlantic NYNEX Mobile, Inc. (BANM)
Committee to Preserve Lottery Selection (CPLS)
Crystal Communications Systems (Crystal)
Darsh Aggarwal (Aggarwal)
Thomas Domencich/Committee for a Fair Lottery (Domencich)
Great Western Cellular Partners (Great Western)
JMC Enterprises/SDK Enterprises/Donald J. Kunkle/Formula I Cellular (JMC)
Miller Communications, Inc./Skywave Communications Partners (Miller)
Moving Phones Partnership, L.P./FutureWave General Partners, L.P. (Moving Phones)
Price Communications Cellular, Inc. (Price)
RSA Applicants (RSAA)

RSA Operators Group (RSAOG)
Richard L. Vega Group (Vega)
TME Cellular Partners (TME)
Telephone and Data Systems, Inc. (TDS)
Terradyne, Ltd. (Terradyne)
Western Wireless Corporation (WWC)

CCPR PETITION LATE-FILED COMMENTS
American Cellular Services (American Cellular)

CCPR PETITION REPLY COMMENTS
Applicants Against Lottery Abuse (AALA)
Bell Atlantic NYNEX Mobile, Inc. (BANM)
Blackwater Cellular Corp. (Blackwater)
Cellular Communications of Puerto Rico (CCPR)
Century Cellunet Inc. (Century)
Committee to Preserve Lottery Selection (CPLS)
Crystal Communications Systems (Crystal)
Thomas Domencich/Committee for a Fair
Lottery (Domencich)
Moving Phones Partnership, L.P./FutureWave
General Partners, L.P. (Moving Phones)
RSA Operators Group (RSAOG)
Tri-Coastal Cellular II (Tri-Coastal)

APPENDIX B

FINAL RULES

Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22 – PUBLIC MOBILE SERVICES

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 222, 303, 309, and 332.

2. A new Section 22.228 is added to Subpart B to read as follows:

§ 22.228 Cellular Rural Service Area licenses subject to competitive bidding.

Mutually exclusive initial applications for Cellular Rural Service Area licenses are subject to competitive bidding. The general competitive bidding procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

3. A new Section 22.229 is added to Subpart B to read as follows:

§ 22.229 Designated entities.

(a) *Eligibility for small business provisions.*

(1) A very small business is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.

(2) A small business is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.

(3) An entrepreneur is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding $40 million for the preceding three years.

(4) A consortium of very small businesses is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (a)(1) of this section. A consortium of small businesses is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (a)(2) of this section. A consortium of entrepreneurs is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (a)(3) of this section.

(5) For purposes of determining whether an entity meets any of the definitions set forth in paragraphs (a)(1), (a)(2), (a)(3), or (a)(4) of this section, the gross revenues of the entity, its controlling interests and affiliates shall be considered in the manner set forth in § 1.2110(b) and (c) of this chapter.

(b) *Bidding credits.* A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(i) of this chapter. A winning bidder that qualifies as a small business or a consortium of small businesses as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(ii) of this chapter. A winning bidder that qualifies as an entrepreneur or a consortium of entrepreneurs as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(iii) of this chapter.

4. A new Section 22.969 is added to Subpart H to read as follows:

§ 22.969. Cellular RSA licenses subject to competitive bidding.

Mutually exclusive applications for initial authorization for the following Cellular Rural Service Areas filed after the effective date of this rule are subject to competitive bidding procedures as prescribed by Sections 22.228 and 22.229: 332A – Polk, AR; 582A – Barnes, ND; 672A – Chambers, TX; and 727A – Ceiba, PR.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS
Regulatory Flexibility Act

As required by the Regulatory Flexibility Act (RFA),[108] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in this docket.[109] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[110]

A Need for and Objectives of the *Report and Order*:

Congress enacted the Balanced Budget Act of 1997, which requires the Commission to resolve mutually

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[108] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[109] In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, *Notice of Proposed Rule Making*, 16 FCC Rcd 4296, 4308-4310 (2001) (*Notice*).

[110] *See* 5 U.S.C. § 604.

exclusive applications for initial licenses through competitive bidding instead of random selection, with certain exceptions not applicable here.[111] Accordingly, we initiated this rulemaking in order to adopt rules for the granting of initial cellular RSA authorizations by means of competitive bidding. Our objective in this rulemaking proceeding is to establish, for cellular RSA markets for which a tentative selectee has been disqualified, the applicable competitive bidding and licensing rules. Such rules are necessary in order to determine the classes of eligible entities as well as determine what policies, if any, should be adopted to promote participation by small business entities, consistent with the Commission's statutory obligation under Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:

No comments were submitted specifically in response to the IRFA. Some of the comments responding to the proposals contained in the *Notice*, however, discussed issues that could affect small businesses. Two of the three commenters that addressed eligibility for the four cellular RSA licenses at issue generally supported permitting all

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[111] *See* In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (1999); In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 16 FCC Rcd 4860 (2001) (recons. pending).

eligible entities to apply for the licenses.[112] The third commenter opposed such open eligibility (which would encompass small businesses), instead arguing that only entities that had filed lottery applications for these licenses in 1988 and 1989 *and* had appealed the dismissal of their lottery applications should be permitted to apply for these licenses (which would mean only three entities would be potentially eligible).[113]

One commenter supported the proposals contained in the *Notice* to provide bidding credits to small businesses to encourage them to bid on and win the cellular RSA licenses.[114] Another commenter opposed adoption of such bidding credits on the basis that such credits would unfairly and uneconomically skew the auction in favor of smaller entities.[115]

Regarding eligibility for the four cellular RSA licenses, we determined in the *Report and Order* that any entity otherwise qualified under the rules would be permitted to

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[112] *See Report and Order* at ¶¶ 8-21; Cingular Comments at 2; Cingular Reply Comments at 1-7; ALLTEL Comments at 1.

[113] *See Report and Order* at ¶¶ 8-21; Ranger and Miller Comments at 1-17.

[114] *See Report and Order* at ¶¶ 27-33; Ranger and Miller Comments at 15.

[115] *See Report and Order* at ¶¶ 27-33; ALLTEL Comments at 1-3.

apply for any of the four RSA licenses.[116] As explained in greater detail in the *Report and Order* and in Section E *infra*, we concluded that permitting broad-based eligibility would best further the public interest as well as facilitate participation by small businesses.

Regarding the adoption of bidding credits for certain categories of small businesses, we concluded that including such bidding credits as part of the cellular RSA application and bidding process would help to promote opportunities for small businesses.[117] As explained in greater detail in the *Report and Order* and Section E *infra*, implementation of bidding credits facilitates the ability of small businesses to compete against larger entities and promotes economic opportunities for those small businesses.

C. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply:

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[118] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental

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116 *See Report and Order* at ¶¶ 8-21.

117 *See id.* at ¶¶ 27-33.

118 5 U.S.C. § 603(b)(3).

jurisidiction."[119] The term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act.[120] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[121]

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[122] Nationwide, as of 1992, there were approximately 275,801 small organizations.[123] "Small governmental jurisdiction" generally means

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[119] *Id.* § 601(6).

[120] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[121] 15 U.S.C. § 632.

[122] 5 U.S.C. § 601(4).

[123] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

"governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[124] As of 1992, there were approximately 85,006 such jurisdictions in the United States.[125] This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.[126]

According to recent telecommunications industry revenue data, 808 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Services (PCS), which are placed together in that data.[127] This data does not indicate how many of these 808 carriers fall within each of the revenue tiers defined by the Commission[128] for the purpose of

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[124] 5 U.S.C. § 601(5).

[125] 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

[126] *See* note 123, *supra*.

[127] Trends in Telephone Service, Table 19.3 (March 2000).

[128] *See Report and Order* at ¶¶ 29-33. As described in the *Report and Order* and Section E *infra*, the Commission

receiving bidding credits as some form of small business or entrepreneur.

The Commission is required to estimate in this FRFA the number of small entities to which any new rules would apply, provide a description of such entities, and assess the impact of the rule on such entities. The rules adopted in the *Report and Order* will apply to all entities that seek to obtain the subject licenses, including small entities. The number of entities that may apply to participate in these future auctions is unknown. Moreover, these entities might already be providers of cellular service or PCS or other wireless services,[129] or they may have no current involvement in the wireless industry.

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defined an "entrepreneur" as an entity with average annual gross revenues not exceeding $40 million for the preceding three years and provided a 15 percent bidding credit; a "small business" as an entity with average annual gross revenues not exceeding $15 million for the preceding three years and provided a 25 percent bidding credit; and a "very small business" as an entity with average annual gross revenues not exceeding $3 million for the preceding three years and provided a 35 percent bidding credit.

[129] To the extent that existing cellular or PCS operators would apply for the subject authorizations, the applicable NAICS code is 513322. Existing paging carriers, which might also be interested in these authorizations, fall under NAICS code 513321. Resellers of paging and cellular services are identified by NAICS code 51333.

The number of small businesses that have participated in prior auctions has varied. Small businesses, as defined under the Commission's rules in the context of various auctions for authorizations in specific services, have accounted for 1,667 out of a total of 2,096 qualified bidders in all prior auctions, not including broadcast auctions.[130] Given these statistics, we expect a large percentage of participants in our auctions program generally to be small businesses in the future, although this may not be the case in this individual auction.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

We impose no new reporting, recordkeeping, or other compliance requirements in the *Report and Order*. The only projected reporting and recordkeeping requirements that will apply in any auctions for the four cellular RSA authorizations are those that are already established by Commission regulations. Nothing in this rulemaking

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[130] As provided in Section 1.2110(c)(1) of the Commission's rules, and in conformity with the Small Business Act and the regulations of the Small Business Administration, the Commission establishes small business definitions for purposes of its auctions on a service-specific basis. *See* 47 C.F.R. § 1.2110(c)(1); 15 U.S.C. § 632(c)(2)(c); 13 C.F.R. § 121.902(b). Statistics for broadcast license auctions are not available, and would be less relevant to the licenses at issue here.

changes those regulations. We will accept new license applications and use our general Part 1 competitive bidding rules to conduct the auction. These rules require all applicants to electronically submit FCC Form 175 in order to participate in the auction[131] and, at the conclusion of the auction, all high bidders to electronically submit FCC Form 601 to apply for a license.[132] The purposes of these forms are to ensure that applicants are eligible to participate in the auction and that high bidders are eligible to hold the cellular RSA licenses at issue. The Office of Management and Budget has already approved both of these forms.[133] In addition, under our Part 1 rules, any entity wishing to receive a bidding credit for serving qualifying tribal lands must comply with 47 C.F.R. § 1.2110(f)(3), an obligation also approved by the Office of Management and Budget.[134]

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

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131 47 C.F.R. § 1.2105(a).

132 *Id.* § 1.2107(c).

133 FCC Form 175, OMB Control No. 3060-0600 (effective until Apr. 30, 2004); FCC Form 601, OMB Control No. 3060-0798 (effective until Mar. 31, 2002).

134 47 C.F.R. § 1.2110(f)(3).

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[135]

In the *Report and Order*, we adopt rules to permit us to grant initial licenses in four cellular RSAs. In adopting these rules, the Commission considered the potential significant economic impact of the rules on small entities. Specifically, the Commission considered the impact of its eligibility definition on the ability of small businesses even to apply for the licenses at issue in this proceeding and to participate in the associated auctions. The Commission also considered the effect of the proposed bidding credits for three categories of small businesses[136] on the ability of small

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[135] 5 U.S.C. §§ 603(c)(1)-(4).

[136] As described in the *Report and Order* and Section E *infra*, the Commission defined an "entrepreneur" as an entity with average annual gross revenues not exceeding $40 million for the preceding three years and provided a 15 percent bidding credit; a "small business" as an entity with average annual

businesses to compete successfully in the auctions and to build out a system should such businesses be awarded any of the licenses.

Also, in proposing to apply the Commission's existing Part 1 competitive bidding rules to any auctions for these licenses, the Commission took into account their effect on small businesses.

The rules adopted by the *Report and Order* will affect all small entities that seek to acquire any of the four cellular RSA licenses discussed herein. We believe that permitting all eligible entities to apply for the four licenses – instead of restricting eligibility to three applicants that filed lottery applications in 1988 and 1989 – will promote opportunities for participation by small businesses. A greater number of small businesses will have the chance to seek the authorizations at issue.

We have sought to promote small business ownership by defining three tiers of small businesses for the purposes of providing bidding credits to small entities: an "entrepreneur" is an entity with average annual gross revenues not exceeding $40 million for the preceding three years; a "small business" is an entity with average annual gross revenues not exceeding

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gross revenues not exceeding $15 million for the preceding three years and provided a 25 percent bidding credit; and a "very small business" as an entity with average annual gross revenues not exceeding $3 million for the preceding three years and provided a 35 percent bidding credit.

$15 million for the preceding three years; and a "very small business" is an entity with average annual gross revenues not exceeding $3 million for the preceding three years.[137] The bidding credits are 15 percent for entrepreneurs, 25 percent for small businesses, and 35 percent for very small businesses. We specifically rejected arguments in opposition to the use of bidding credits for small businesses. As explained in the *Report and Order*, adoption of bidding credits for small businesses provides them with an opportunity to compete successfully against larger, well-financed bidders.[138] We believe the bidding credits we have adopted will benefit a range of small businesses.

We will apply our Part 1 competitive bidding rules equally to all applicants for the licenses, including small businesses. Our Part 1 competitive bidding rules have been designed to ensure that small businesses are not placed at a

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[137] The Small Business Administration approved these proposed small business definitions on January 30, 2001. *See* Letter from Fred P. Hochberg, Acting Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 30, 2001. *See also* Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Gary M. Jackson, Assistant Administrator, Small Business Administration, dated Sept. 21, 2001.

[138] *Report and Order* at ¶ 32.

disadvantage and have a full and fair opportunity to compete in fair auction proceedings. While these rules require small businesses to submit application forms in order to participate in the auctions for the subject licenses, we believe that equitably applying the same rules to all entities helps to promote fairness in the process and to ensure that the auction is effective. Fair and effective auction proceedings benefit small businesses as well as all other participants.

Report to Congress: The Commission will include a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[139] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof)

[139] *See* 5 U.S.C. § 801(a)(1)(A).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1093 September Term, 2003

Ranger Cellular and Miller Communications, Inc.,
Petitioners

Filed On:
Sep 10, 2003

v.

Federal Communications Commission and United States of America
Respondents

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson,* Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /S/
Michael C. McGrail
Deputy Clerk

*Circuit Judge Henderson did not participate in this matter.

47 U.S.C. 309(l):

(l) Applicability of Competitive Bidding to Pending Comparative Licensing Cases.

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall--

(1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit;

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date of enactment of the Balanced Budget Act of 1997.

Supreme Court, U.S.
FILED
MAR 10 2004
OFFICE OF THE CLERK

(2)

No. 03-831

In the Supreme Court of the United States

RANGER CELLULAR AND
MILLER COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in interpreting 47 U.S.C. 309(*l*) of the 1997 Balanced Budget Act, which required the applicant pool in any upcoming auction to be limited to those with pending applications, the Federal Communications Commission (Commission) reasonably read the statute as applying only to pending applications for broadcast licenses that had previously been awarded through comparative hearings, and not to pending lottery applications for cellular licenses, such as those that petitioners had filed.

2. Whether the Commission reasonably decided that its policy goals and the public interest generally would best be served by holding unrestricted auctions for the cellular licenses at issue in this case.

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v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 333 F.3d 255. The decision of the Federal Communications Commission (Pet. App. 13-75) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2003. A petition for rehearing was denied on September 10, 2003 (Pet. App. 76-77). The petition for a writ of certiorari was filed on December 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the passage of the Federal Communications Act in 1934, the Federal Communications Commission (Commission) has been charged with assigning licenses for use of the electromagnetic spectrum for "the public interest, convenience, or necessity." See, *e.g.*, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 137-138 (1940). Prior to 1993, the Commission awarded licenses through either a comparative hearing or a lottery. Initially the FCC used comparative hearings, which rated competing applicants under a public interest standard. See 47 U.S.C. 309(a). In 1981, in response to the administrative burden such hearings entailed, Congress authorized the use of lotteries. See *Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987). Those two methodologies placed very different burdens on both the FCC and the applicants. Applicants in the comparative hearing process had applications to the Commission, and frequently became embroiled in protracted litigation. Pet. App. 3. See *Bechtel* v. *FCC*, 10 F.3d 875 (D.C. Cir. 1993); *Bechtel* v. *FCC*, 957 F.2d 873 (D.C. Cir. 1992). Lottery applicants, by contrast, had to file a simple application and pay a nominal fee. If the winner was disqualified, the Commission held another lottery. Pet. App. 2. Before 1993, the Commission used comparative hearings to award commercial broadcast licenses and used lotteries to award cellular licenses such as those at issue in this case. See *id.* at 2-3.

2. In 1993 Congress enacted 47 U.S.C. 309(j) (1994), as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 387. That provision authorized the FCC to award spectrum licenses by competitive bidding. If the service that was

the subject of the award was of a type for which auctions could be used under statutory criteria, Section 309(j) provided that "[t]he [FCC] shall not issue any license or permit [by lottery] after the date of enactment of this Act unless * * * one or more applications for such license were accepted for filing by the Commission before July 26, 1993." § 6002(e) and (e)(2), 107 Stat. 397. The Commission thus had discretion to decide whether to use auctions or continue to use lotteries to assign licenses for which applications were on file prior to July 26, 1993. Because the initial lottery winner had been disqualified in a number of instances, a few cellular licenses fell into the category of licenses for which applications were on file prior to July 26, 1993, including several for which petitioners had filed applications in 1988 and 1989.

3. Congress enacted the statutory provision primarily at issue in this case—47 U.S.C. 309(*l*)—in the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a), 111 Stat. 258-260. At that time the FCC was still considering whether to use lotteries or auctions to award the few cellular licenses that had not yet been awarded. See *In re Certain Cellular Rural Serv. Area Applications*, 17 F.C.C.R. 8508, 8509-8510 (2002). The 1997 Act resolved that issue by generally directing the Commission to use auctions. It repealed the prior provision that had granted the Commission discretion to proceed either by auction or lottery, and replaced those provisions with the present Section 309(j)(1) and (2), 47 U.S.C. 309(j)(1) and (2), which require the Commission to assign all licenses by auction, apart from exemptions recognized in Section 309(j)(2) that are not relevant here. Following the passage of the 1997 Act, cellular licenses could therefore no longer be awarded by lottery.

The section heading of the new Section 309(*l*), which, as the court of appeals noted (Pet. App. 8), was a part of the Act itself and not added by the Reviser, stated that it was to apply to "pending comparative licensing cases." Section 309 (*l*) provides:

> With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall—(1) have the authority to [conduct auctions]; and (2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding.

47 U.S.C. 309(*l*). The provision therefore identifies a class of cases—those involving "competing applications for initial licenses or construction permits for commercial radio or television stations" in which applications had been filed before July 1, 1997. In those cases, the Commission could, but was not required to, choose to conduct auctions, and any such auctions had to be limited to the existing applicants.

4. The Commission issued a Notice of Proposed Rulemaking proposing to hold unrestricted auctions for the cellular licenses (dubbed "RSA" licenses, for Rural Service Area) at issue in this case. *In re Implementation of Competitive Bidding Rules to Licensing Certain Rural Serv. Areas, Notice of Proposed Rulemaking*, 16 F.C.C.R. 4296 (2001). After reviewing comments, the Commission issued the order under review, in which it decided to hold open—not restricted—auctions. See Pet. App. 13-62.

The Commission concluded that "it is in the public interest to allow all entities * * * to participate in the RSA auction." Pet. App. 27-28. The Commission noted

that it "has generally favored open eligibility because [it] believe[s] that maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public." *Id.* at 28. In the Commission's view, that approach "best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act." *Ibid.* The Commission also concluded that there are not "compelling reasons to exclude potential participants in the upcoming * * * auction." *Id.* at 28-29. See *id.* at 32 ("[A] policy of unrestricted eligibility in the RSA auction will best fulfill our public interest goals."); *id.* at 33 (finding that open eligibility will best serve statutory goal of "enourag[ing] the rapid deployment of services specifically to rural areas").

The Commission rejected petitioners' "statutory and equitable arguments against open eligibility." Pet. App. 35. In particular, the Commission rejected petitioners' claim that Section 309(*l*) by its terms restricts eligibility for the auctions at issue in this case to lottery applicants whose applications were on file before July 1997. *Ibid.* The Commission explained that Section 309(*l*) is limited to licenses for "commercial radio and television stations," a phrase that "clearly refers to broadcast facilities." *Id.* at 36-37. The Commission noted that "[w]here Congress has referred to wireless services like cellular in other provisions of the Communications Act, * * * it has clearly used the term 'commercial mobile service.'" *Id.* at 37-38 (citing 47 U.S.C. 253(e), 274(i)(2)(B), 333(c)(1) and (d)(2)). The Commission also drew support from the Conference Report on Section 309(*l*), which specifically referred to the provision's applicability "to resolve any mutually exclusive applications for *radio or television broad-*

cast licenses that were filed with the Commission prior to July 1, 1997." Pet. App. 38 (emphasis in FCC Order) (citing H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess. 573 (1997)). On those bases, the Commission rejected petitioners' argument that Section 309(*l*) had to be read to require the auctions for the cellular licenses at issue here to be limited to those whose applications were pending on July 1, 1997.

The Commission also rejected petitioners' "equitable arguments that [petitioners] contend support artificially limiting eligibility." Pet. App. 39. The Commission found that petitioners "fail to show how the public interest would be served by limiting the RSA auction to only three former lottery applicants." *Id.* at 40; see *id.* at 35 n.51 (noting that petitioners and at most one other applicant would be the only auction participants under petitioners' theory). The Commission rejected petitioners' arguments that opening up the auction would delay the licensing in litigation, noting that "the Commission necessarily is guided by the public interest objectives set forth in Section 309(j)(3)(A)-(D) in setting application eligibility and not by concerns over the prospects of litigation and appeals." *Id.* at 41. The Commission also noted that petitioners' arguments "totally disregard the equities of other parties potentially interested in seeking the subject authorizations, as well as equitable considerations relevant to the public interest." *Ibid.* The Commission found that open eligibility would have "a greater probability than limited eligibility of resulting in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use of the spectrum." *Id.* at 41-42.

5. On petition for review, the court of appeals upheld the Commission's decision. Pet. App. 1-12. The court noted that petitioners had "offer[ed] several non-frivolous arguments that § 309(*l*) must be read to apply to licenses to provide cellular telephone service." *Id.* at 7. But, the court held, petitioners' "arguments do not demonstrate that § 309(*l*) simply must be read as applying to cellular telephone licenses." *Ibid.* The court acknowledged that the phrase "'commercial radio and telephone licenses' is not defined, nor is it used, in the 1997 Act outside the provision adding § 309(*l*) to the Communications Act." *Ibid.* The court also noted, however, that a similar phrase—"commercial radio"—"had been used * * * in both the Communications Act and the regulations promulgated thereunder, to mean only broadcast radio." *Ibid.* The court also observed that the heading of Section 309(*l*), which refers to "pending comparative licensing cases," supported the FCC's conclusion. *Id.* at 8. While "as of 1997 broadcast licenses had for more than 50 years been awarded through comparative hearings," cellular telephone licenses had "not been the subject of comparative hearings since at least 1986." *Ibid.* Finally, the court found that the Conference Committee Report cited by the Commission "clearly implies that the Congress intended to limit the scope of § 309(*l*) to broadcast licenses." *Ibid.*

Based on those observations, the court concluded "that the Congress has not directly spoken to the question whether § 309(*l*) covers only broadcast stations." Pet. App. 8. The court found that, "for the same reasons the Commission's arguments cast doubt upon the clarity of § 309(*l*), the agency offers a reasonable interpretation of the statute." *Id.* at 8-9. The court concluded that "[a]lthough [the Com-

mission's] reading is not the only possible interpretation of § 309(*l*), it is certainly a reasonable one and therefore commands our deference." *Id.* at 9.

The court also rejected petitioners' argument that the FCC had failed to follow its own precedents in determining to open the auction to newcomers. The court found that "the Commission reasonably applied appropriate factors to the circumstances of this case," including the benefits of granting licenses through auctions to those who "value them most highly and are, therefore, most likely to offer prompt service to the public." Pet. App. 9. The court also found that the Commission had acted reasonably in relying on its "special responsibility * * * to promote the rapid development of service" in rural areas covered by the licenses at issue. *Id.* at 10. The court found that the Commission's past decisions on which petitioners relied were all distinguishable. *Ibid.*

ARGUMENT

The decision of the court of appeals was correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case does not present a question of exceptional importance, but only two narrow questions that lack ongoing significance: the proper interpretation of a statutory provision that applied to a small class of then-pending FCC licensing cases; and the reasonableness of the FCC's exercise of its discretion in declining to limit the applicant pool in auctions for cellular licenses in the unique circumstances of this case. Neither question is likely to arise again in the future. Further review is unwarranted.

1. Contrary to petitioners' apparent suggestion (Pet. 9) that this case could apply to "thousands of applicants" whose applications were pending in 1997, the

question presented in this case involves only the fact-specific application of a particular federal statute and would likely affect only the two petitioners in this case. Section 309(*l*) itself served the function of protecting a limited class of broadcast applicants whose comparative hearing cases were still pending in 1997, during the last stage of the Commission's congressionally directed transition to auctions. As a transition rule, Section 309(*l*) applied by its terms only to licenses for which "competing applications * * * were filed with the Commission before July 1, 1997." 47 U.S.C. 309(*l*). Section 309(*l*) will have no further application to future auctions.

Even with respect to the class of applicants with applications pending on July 1, 1997, petitioners' claim will likely affect only petitioners, because it appears that petitioners are the only parties that could now be affected by a ruling on the meaning of Section 309(*l*). In keeping with its established practice and precedent, the Commission dismissed the cellular applications that had been pending on July 1, 1997 (without prejudice to re-file to participate in an auction) before proceeding to hold open auctions. See *Bachow Communications, Inc.* v. *FCC*, 237 F.3d 683, 686-688 (D.C. Cir. 2001). No applicants other than petitioners preserved an objection to those dismissals.[1] Accordingly, even if peti-

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[1] Petitioners did challenge the dismissals in another case, but the court of appeals has now ruled against them. See *Ranger Cellular & Miller Communications, Inc.* v. *FCC*, 348 F.3d 1044, 1050 n.5 (D.C. Cir. 2003). That case involved *four licenses, in addition to the four licenses at issue in this case.* See *id.* at 1047. Although the Commission noted that the auctions in this case potentially involved one additional applicant named High Tower Communications, see Pet. App. 35 n.51, that applicant neither pre-

tioners were ultimately to prevail on their claims in this case and the Commission were required to hold new auctions limited to applications pending on July 1, 1997, petitioners would be the only parties who, because they have preserved their objections to the dismissals, could participate. Thus, any decision by the Court in this case would affect only petitioners and would have no bearing on any other pending or potential case involving the applicability of Section 309(*l*).

2. Petitioners argue (Pet. 10) that the court of appeals erred when it "found [Section 309(*l*)] ambiguous and on that basis deferred to the FCC's interpretation of the statute," because, in petitioners' view, "the FCC itself had found that the statute was *not* ambiguous and therefore had not gone through the process of expert statutory interpretation which *Chevron* Step II contemplates." See Pet. 18-21. Petitioners refer to the second step of the analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 (1984), in which, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

a. Further review of that issue is not warranted because it was neither pressed nor passed on below. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioners did not argue to the court of appeals that the FCC's interpretation was not entitled to *Chevron* deference because the Commission had "not gone through the process of expert statutory interpretation." Pet. 10. To the contrary, petitioners con-

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served its objections by arguing against the dismissal in the above case nor participated in petitioners' petition for review in this case.

ceded that the FCC had engaged in statutory construction, see, *e.g.*, Pet. C.A. Br. 11 ("The FCC has *chosen to interpret* the statutory protection accorded by Congress to pre-1997 filers as applicable only to broadcast applicants.") (emphasis added), and argued that the FCC's interpretation was not a reasonable one, see *id.* at 19-20.[2] Nor did the court of appeals address any argument that the FCC's interpretation was not entitled to deference because the FCC did not actually arrive at its own interpretation of the statute.

b. In any event, petitioners' "novel" (Pet. App. 10) claim is mistaken, because the FCC made quite clear that, insofar as Section 309(*l*) left any room for interpretation, it should be understood to permit open public auctions for the cellular licenses at issue in this case. The Commission began its discussion by noting that it had in recent years "generally favored open eligibility" because "maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public." *Id.* at 28. The Commission explained repeatedly that open

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[2] In their reply brief, petitioners did state that "[b]efore the [court of appeals] the FCC argues for the first time that the statute is ambiguous, and therefore the Commission is entitled to *Chevron* deference for its interpretation," and they commented that the FCC's Order "said that the statute was plain on its face." Pet. C.A. Reply Br. 12 (footnote omitted). A party may not raise new arguments in a reply brief. In any event, even in their reply brief, petitioners did not suggest that this case presented the issue they now raise—the proper disposition of a case in which an agency could have engaged in its own process of statutory interpretation that would have received *Chevron* deference, but did not do so. Nor did petitioners at any point suggest that a remand to the Commission might be an appropriate disposition of the case.

eligibility thus "best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act." *Ibid.* See *id.* at 32-33. The Commission also noted that it had a special statutory responsibility under 47 U.S.C. 309(j)(4)(B) "to encourage the rapid deployment of services specifically to rural areas," and that awarding the RSA licenses at issue here through an open auction "will encourage participation in the RSA auction by entities that are most likely to be interested in, and capable of, serving rural areas." Pet. App. 33. The Commission also found that petitioners' "equitable arguments against open eligibility" were not persuasive. *Id.* at 35; see *id.* at 39-42.

The Commission was therefore quite explicit that, as a matter of policy, it believed that open eligibility would best serve the statutory goals. To be sure, the Commission also believed that its construction of Section 309(*l*) was consistent with Congress's intent in enacting Section 309(*l*). The Commission concluded that, when examined in light of the Communications Act as a whole and the legislative history of Section 309(*l*), the crucial coverage phrase—"commercial radio and television stations"—"clearly refers to broadcast facilities," rather than the cellular facilities at issue in this case. Pet. App. 36-37. But that simply shows that the Commission concluded that Congress's intent was entirely in accord with the Commission's own preferred interpretation. It does not show that the Commission in some way failed to engage in precisely the process of statutory interpretation contemplated by *Chevron* and to which a court must defer. This case therefore does not present any question regarding the applicability of the *Chevron* rule to a situation in which an agency has followed an interpretation of a statute that it mistakenly believes is required, even though, if the agency

had known that the statute were ambiguous, the agency would perhaps have adopted another course.

3. Petitioners also argue (Pet. 10-18) that the court of appeals erred in holding that Section 309(*l*) was open to the interpretation adopted by the Commission, under which the Commission had authority to hold open auctions for the cellular licenses at issue here. The court recognized that petitioners advanced "non-frivolous" arguments for construing the phrase "commercial radio or television stations" in Section 309(*l*) as applicable to cellular licenses, as well as broadcast licenses. Pet. App. 7. Ultimately, however, petitioners' arguments prove at most that the phrase is ambiguous and subject to interpretation. In that situation, as the court of appeals correctly found, the Commission's interpretation of Section 309(*l*) is entitled to *Chevron* deference and is controlling.

The court of appeals noted several reasons why the Commission's interpretation of Section 309(*l*) to refer solely to auctions for broadcast licenses was reasonable. The phrase "commercial radio or television stations" in Section 309(*l*) should be construed in light of Congress's use of the similar phrase "commercial radio" in the Communications Act and the FCC's use of that phrase in its own regulations to refer only to broadcast entities. See Pet. App. 7-8, 37-38. Moreover, as the court of appeals explained, the heading of Section 309(*l*) supports that interpretation, because its reference to "pending comparative licensing cases" must be understood to refer only to broadcast licensing cases, since those were the only licensing cases under the comparative hearing regime pending when Section 309(*l*) was enacted. See *id.* at 8; see also *INS* v. *National Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving

an ambiguity in the legislation's text."). Finally, the legislative history supports the same interpretation, because the Conference Committee Report refers to Section 309(*l*) as applicable to "radio or television *broadcast* licenses" and makes no reference to any broader application to cellular licenses. See Pet. App. 8.

For those reasons, the court of appeals correctly held that the Commission's interpretation of Section 309(*l*) was controlling under *Chevron*. In any event, further review would not be warranted to determine whether the court of appeals correctly upheld as reasonable the Commission's interpretation of Section 309(*l*)—a statute that contains a limited-time transition rule and that will have no further general application in the future.

4. Notwithstanding its decision that Section 309(*l*) did not *require* limiting the eligibility pool for cellular auctions, the FCC nonetheless had discretion to restrict its cellular auctions as a matter of policy if it decided that doing so would be appropriate. Petitioners argue (Pet. 21) that the Commission's decision to employ an open auction here was "a major deviation from established agency policy" that was not adequately explained by the Commission. There was no deviation in this case from any "established policy," however, and the court of appeals correctly held that "[t]he Commission has * * * properly distinguished its precedents." Pet. App. 10. In any event, further review of the court of appeals' case-specific conclusion that the FCC "considered the relevant factors and did not act in an arbitrary and capricious manner in applying the public interest standard" in this case would not be warranted. *Ibid.*

The Commission has always looked to equitable factors and the public interest in determining whether to limit eligibility for auctions. As the FCC explained,

however, "[i]n recent years, the Commission has generally favored open eligibility" because it best "ensure[s] that licenses are awarded to entities that * * * are most likely to offer prompt service to the public." Pet. App. 28. The Commission reasoned that "adopting open eligibility" would more likely result "in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use of the spectrum." *Id.* at 41-42. The Commission applied that established policy favoring open eligibility here.

In addition, the Commission referred to other factors that supported open eligibility in the particular circumstances here. The Commission noted that cellular operators had been granted interim operating authority to provide service in the areas at issue in this case. Pet. App. 27 & n.29. As the court of appeals recognized, the fact that service was being provided on an interim basis made it feasible to reopen the application process, even though that could result in some delay in ultimate award of the licenses. *Id.* at 10. The Commission also referred to the fact that "nearly twelve years have passed since the closing of the original RSA filing window," so that many parties now interested in participating in the auction "would not have had the opportunity to file applications, while some applicants that did file lottery applications may no longer exist." *Id.* at 26-27; see *id.* at 42 ("[T]here may be parties interested in providing cellular service in these markets, and qualified to do so, that did not even exist at the time the lottery applications were filed."). The Commission acted reasonably in deciding that open eligi-

bility was warranted on the circumstances present in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2004

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[3] Petitioners err in contending (Pet. 24) that the court of appeals improperly relied on a "*post hoc* justification" proffered by agency counsel as the basis for distinguishing prior Commission precedent. Some of the precedents cited by petitioners did not involve open eligibility at all. See Pet. App. 10, 39 n.61. Beyond that, the Commission made clear that its decision in this case depended in part on a balancing of the particular equitable factors present here. See *id.* at 39-42. The Commission's order expressly noted that customers in the affected areas were already receiving service, see *id.* at 27 n.29, rejected petitioners' arguments that the "delay" caused by open eligibility provided a reason not to adopt that approach, *id.* at 41, and determined that open eligibility would, in the circumstances of this case, more likely "result[] in the rapid deployment of new technologies and services to the public," *ibid.* Based on those considerations, the court of appeals relied on the Commission's own findings and reasoning—not a "*post hoc* justification"—in concluding (*id.* at 10) that the Commission had "properly distinguished its precedents" cited by petitioners.

(3)

No. 03-831

Supreme Court, U.S.
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In the Supreme Court of the United States

RANGER CELLULAR AND
MILLER COMMUNICATIONS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

PETITION FOR *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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PARTIES AND RULE 29.6 DISCLOSURES

The parties before the United States Court of Appeals for the District of Columbia Circuit were Petitioners Ranger Cellular ("Ranger") and Miller Communications, Inc. ("Miller"), the Federal Communications Commission ("FCC") and United States of America.

Ranger is a general partnership without any subsidiaries, parent companies or affiliates which have issued shares or debt securities. Miller is a closely held Florida corporation without any subsidiaries, parent companies or affiliates which have issued shares or debt securities.

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ARGUMENT IN REPLY

This reply will address briefly the four points submitted by the FCC and Solicitor General (collectively, "the FCC") in opposition to the Petition for Writ of Certiorari filed by Ranger Cellular and Miller Communications, Inc. ("Petitioners"). The FCC argues that this case has little significance because, although thousands of applications may have been dismissed by the FCC in contravention of the statute, only two applicants have challenged that action in court. Next it argues that the Court cannot review the Court of Appeals' failure to follow *Chevron*[1] because that issue was not pressed below. Then it argues that, although it declared the statute at issue "plain on its face," the FCC nevertheless did go through a process of interpreting an ambiguous statute which was subject to judicial deference. Finally, the FCC suggests that its ultimate decision was consistent with precedent and did not hinge on a post-hoc distinction offered to the appellate court to justify the outcome. As will be shown, all of these contentions are flatly erroneous.

A. This Case Is Important Both With Respect to the Misuse of Legislative History to Override Statutory Text and With Respect to the Application of the *Chevron* Doctrine

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[1] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

The FCC tries to minimize the significance of this case by noting that only two of the thousands of applicants who were unlawfully dismissed by the FCC have pursued the matter in Court. The fact that an administrative agency chose to ignore an express Congressional directive regarding the treatment of several thousand pending applications should be a matter of serious concern regardless of the larger implications of the case, but those implications are large indeed. To suggest that, because the case only involves two applicants for eight markets, it has no significance outside the circumstances presented is like saying that *Marbury v. Madison*[2] just involved four office seekers and a statute that applied only to a finite set of government appointees. Let there be no mistake that the principles at stake here are important ones.

First, no one reading the plain text of the statute would ever conclude that it extended only to broadcast applicants. As Petitioners demonstrated at length in their petition, Congress invariably and expressly identifies broadcast licenses by name when it intends statutory provisions to apply only to those stations. Here it not only did not do so, but it used language that expressly includes non-broadcast stations. The only conceivable way that you could take this statute and decide that it applies only to broadcast stations is by using a sentence of the legislative history to add a limitation hinted at in the Conference Report but not actually adopted by Congress. The over-reliance on legislative history as a substitute for statutory text is an abuse of statutory construction which this Court has tried to eradicate. The issue is squarely and dramatically raised by the circumstances of this case, and it presents an excellent opportunity to provide guidance to lower courts on this

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[2] 5 U.S. (1 Cranch)137 (1803).

issue.

Second, the case raises the issue of the proper course for a reviewing court to follow under the *Chevron* doctrine when a reviewing court overturns an administrative agency's determination that a statute is plain on its face. *Chevron* makes it clear that no "deference" is due to an agency when Congress has plainly spoken to the matter at issue. *Chevron* suggests, but leaves unclear, whether the reviewing court may then simply undertake the interpretation of an ambiguous statute itself or must take some other course. The D.C. Circuit has held that where an agency's determination that a statute is plain on its face is wrong, the case will be remanded to the agency to undertake an interpretation.[3] The course followed by the D.C. Circuit here – overruling the administrative finding of non-ambiguity but then deferring to the agency's interpretation – made no sense at all under any view of the analysis required by *Chevron*. Obviously, clear guidance from this Court on a situation which commonly occurs is required.

B. The Court of Appeals Erroneously Applied *Chevron* in a Way Not Adopted by the Commission

The FCC argues that Petitioners did not raise at the Court of Appeals the issue of whether *Chevron* Step I or Step 2 was to be followed, and therefore the issue is not reviewable here. The FCC's point directly underscores the nub of Petitioners' grievance. The FCC Order under review expressly found that Section 309(l) is "plain on its face." (Pet. App at 36) Petitioners also believed that the statute

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[3] *Cajun Electric Power Coop, Inc. v. F.E.R.C.*, 924 F. 2d 1132, 1136 (D.C. Cir. 1991).

was plain on its face, but with the opposite meaning from that adopted by the FCC. The appeal was therefore presented to the Court of Appeals as a pure Chevron Step I case. (See Appellants Brief at 19-20) In its opposing appellate brief, the FCC for the first time disavowed the agency's plain-on-its-face determination and instead began to argue that the court should defer to the FCC's "interpretation" of an ambiguous statute. This was, of course, an entirely new foundation for the FCC action which was raised in its responsive brief by counsel. It is no wonder, then, that Petitioners opposed that contention for the first time in their Reply Brief to the Court of Appeals; that was the first time the agency had even hinted that its earlier finding of non-ambiguity, as set forth in its Report and Order, was no longer operative.

Faced with an agency which was rapidly backtracking on the sole basis for its interpretation of the statute, the Court of Appeals should either have remanded the case or interpreted the statute itself. It did neither. Petitioners could hardly have anticipated that the Court would go off on a tack that both overruled the Commission's finding that no interpretation was needed but at the same time deferred to the agency's interpretation – an interpretive exercise which would have been unlawful given the agency's declaration that the statute was plain on its face. This created, in technical terms, an entirely new mess. Petitioners timely sought rehearing, which the Court of Appeals declined. The only avenue for redress of the Court of Appeals' error is review by this Court.

C. The FCC Cannot Simultaneously Find a Statute Unambiguous and Interpret the Statute as Ambiguous

The FCC appears to be arguing here that, despite its declaration that the statute is plain on its face, it nevertheless *did* undertake an expert interpretation of the statute which is now entitled to *Chevron* deference. This argument exemplifies the eel-like slipperiness of the FCC's positions. *Chevron* contemplates a rather simple two-pronged analytic process for construing statutory language: if the statute is clear on its face (i.e., if Congress has directly spoken to the issue) that ends the matter. No interpretation by the agency is necessary or even appropriate. If, on the other hand, the statute is silent or ambiguous on the point in issue, then the agency may use its expertise to fill in the blanks left by Congress. The *Chevron* analysis is logically an either/or proposition. An agency cannot say that a statute is unambiguous and at the same time offer an expert interpretation of its ambiguity. The Court of Appeals bought this logical impossibility, but this Court should not.

D. The Court of Appeals Improperly Accepted a Post-Hoc Explanation for the Agency's Deviation From Its Consistent Precedent

In the rulemaking proceedings before the FCC, Petitioners demonstrate that never in the twenty years surveyed had the FCC dismissed a group of pending applications simply because it was changing the licensing method in mid-stream. So long as the underlying nature of the licenses in issue was remaining constant, the FCC has always preserved the "cut-off" status of the original timely filers and permitted them alone to vie for the license under the new methodology. The FCC *Report and Order*, somewhat astoundingly, denied that it had ever even applied these precedents. (Pet. App. at 40-41) Just prior to this decision in the case at bar, the FCC had resolved the question of how to treat pending broadcast

applications which had, like the application here, migrated in mid-stream from one licensing method to an auction method. In that proceeding[4] the FCC decided that it would be inequitable to open the process to new filers given the possibility of delay and the fact that the original filers had filed with the expectation that they would only have to compete against people who had timely filed during the original window. This case had been affirmed by the Court of Appeals and appeared to be precisely on point in every pertinent particular with the case here. Although repeatedly pointed to as the controlling precedent for the FCC to follow, the FCC did not address it all, much less distinguish it.

The Court of Appeals recognized that a recent, apparently controlling administrative precedent could not simply be ignored. It therefore accepted FCC appellate counsel's suggestion that the broadcast case was distinguishable because in the broadcast case there were no interim operators and therefore there was a greater need for expedition than in the cellular case. The FCC itself had offered no such distinction. (Indeed, as a matter of fact, there *were* interim operators on at least some of the broadcast licenses.[5] The danger of appellate courts accepting post hoc rationalizations is that they can easily get the facts wrong). The FCC here ignores the problem and instead tries to argue that there were other public interest-

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[4] *Implementation of Section 309(j) of the Communications Act, Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses and Issues, Regarding Comparative Hearings*, 13 F.C.C.R. 15920, 15958-60 (1998).

based grounds to arrive at the conclusion it did. As long as we operate under a rule of law where precedent must be followed or deviations explained, the FCC's violation of that principle cannot stand.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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